TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 389

DEPARTMENT OF REVENUE, PETITIONER,

vs.

JAMES B. BEAM DISTILLING COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

PETITION FOR CERTIORARI FILED AUGUST 30, 1963

CERTIORARI GRANTED OCTOBER 14, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 389

DEPARTMENT OF REVENUE, PETITIONER,

vs.

JAMES B. BEAM DISTILLING COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 20, 1963

[fol. 1] [File endorsement omitted]

IN THE COURT OF APPEALS OF KENTUCKY

JAMES B. BEAM DISTILLING COMPANY, Appellant,

v.

DEPARTMENT OF REVENUE, Appellee.

STATEMENT OF APPEAL—Filed July 17, 1961

The name and address of Counsel for Appellant is: Millard Cox, 1021-1023 Kentucky Home Life Building, Louisville 2, Kentucky.

The names and address of Counsel for Appellee are: William S. Riley, Paul D. Ross, Hal O. Williams, Department of Revenue, Frankfort, Kentucky.

The name and address of the trial Judge is: Honorable Henry Meigs, Franklin Circuit Court, Frankfort, Kentucky.

The judgment appealed from was entered June 9, 1961 (R. pp. 26-29).

The Notice of Appeal was filed June 21, 1961 (R. p. 32).

The jurisdictional amount in controversy on appeal as shown by the record (R. p. 8) is $5,107.09.

Millard Cox, Counsel for Appellant.

[fol. 4] [File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT

Civil Action File No. 60459

JAMES B. BEAM DISTILLING CO., Petitioner,

v.

DEPARTMENT OF REVENUE, Respondent.

PETITION OF APPEAL—Filed February 9, 1961

On April 27, 1960, Petitioner, James B. Beam Distilling Co., filed with the Department of Revenue its claim for refund of certain import taxes. The Department of Revenue denied said claim June 10, 1960. Thereafter on June 16, 1960, Petitioner filed a Petition for Review before the Kentucky Tax Commission. On February 1, 1961, by Order Number 2861, the Kentucky Tax Commission affirmed the ruling of the Department of Revenue and denied the Petitioner's claim to a refund.

Petitioner asks that the Franklin Circuit Court overrule the Orders of the Department of Revenue and the Kentucky Tax Commission and enter a Judgment in favor of Petitioner for a refund of said taxes.

Millard Cox, 1022 Kentucky Home Life Bldg., Louisville 2, Kentucky, Attorney for James B. Beam Distilling Company, Tel. No. JUniper 3-0291.

[fol. 5]

IN THE FRANKLIN CIRCUIT COURT

Civil Action No. 60459

JAMES B. BEAM DISTILLING COMPANY, Appellant,

v.

DEPARTMENT OF REVENUE, Respondent & Appellee.

(Commonwealth of Kentucky)

SUMMONS ON APPEAL

To the Sheriff of Franklin County

The Commonwealth of Kentucky to the Above-Named Defendant:

You are hereby summoned and required to serve upon Millard Cox, appellant's attorney, whose address is Kentucky Home Life Building, Louisville, Kentucky, an answer to the statement and petition of appeal herein, within 20 days after service of this summons upon you, exclusive of the day of the service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the statement and petition of appeal.

Witness Kelly C. Smither, Clerk of said court, this the 9th day of February, 1961.

Kelly C. Smither, Clerk Franklin Circuit Court.

By Virginia S. Marris, D.C.

[fol. 6] [File endorsement omitted]

BEFORE THE KENTUCKY TAX COMMISSION
COMMONWEALTH OF KENTUCKY

PETITION FOR REVIEW OF THE ACTION OF THE DEPARTMENT OF REVENUE IN DENYING A REFUND OF CERTAIN IMPORT TAXES PAID BY JAMES B. BEAM DISTILLING COMPANY UNDER THE PROVISIONS OF K.R.S. 243.680 (2)—Filed June 16, 1960

Paragraph 1

On April 27, 1960 James B. Beam Distilling Company filed a written application for the refund of certain taxes paid on distilled spirits imported into Kentucky from Scotland between the dates of September 1, 1959 and April 1, 1960 under the provisions of K.R.S. 243.680 (2). Reference to said written application is hereby made and it is hereby incorporated as a part of this Petition for Review as though copied in full herein.

Paragraph 2

On June 10, 1960, in a letter signed by Hon. Froman Ratcliff, Supervisor, Miscellaneous Tax Section, the Department of Revenue denied the refund of said taxes.

Paragraph 3

The Taxpayer requests that the Kentucky Tax Commission review the final action of the Department of Revenue in denying said refund and as grounds for review states that the statute, K.R.S. 243.680 (2), under which said taxes were collected is unconstitutional because it is in conflict with Article I Sec. 10 Clause 2 of the Constitution of the United States; and that the Department of Revenue was, therefore, in error in denying said refund.

[fol. 7] Millard Cox, Attorney for James B. Beam Distilling Company, 1022 Kentucky Home Life Building, Louisville 2, Kentucky, Tel.—JU 3-0291.

June 13, 1960

Received this 16th day of June 1960.

Kentucky Tax Commission

by Georgia Moffett

[fol. 8] [File endorsement omitted]

BEFORE THE DEPARTMENT OF REVENUE
COMMONWEATH OF KENTUCKY

Application by James B. Beam Distilling Company for refund of import taxes paid under the provisions of K.R.S. 243.680 (2).

STATEMENT OF FACTS—Filed April 27, 1960

James B. Beam Distilling Company (hereinafter referred to as "the taxpayer") is a Corporation organized under the laws of Illinois.

Taxpayer is engaged in the business of manufacturing, warehousing, bottling, importation and sale of distilled spirits products; and, as such, owns and operates plants at Clermont and Beam in Bullitt and Nelson Counties, Kentucky.

Taxpayer is licensed by the laws of the United States and the State of Kentucky to conduct its operations under the following permits:

Distiller's permit (Ky.) DT-157
Distiller's permit (U.S.) DSP-KY-230
Importer's permit (U.S.) CIN-I-131

During the year 1959, the taxpayer entered into an agreement with W. A. Gilbey Limited of London, England (hereinafter referred to as "Gilbey"), under the terms of which the taxpayer as a licensed U. S. importer was granted the exclusive right to buy from Gilbey, for importation, sale and distribution in the United States, Gilbey's product known as Gilbey's Spey Royal Scotch Whiskey.

Between the dates of September 1, 1959 and April 1, 1960, the taxpayer, acting under its agreement with Gilbey and pursuant to the authority of its U. S. and Kentucky import [fol. 9] permits, has purchased from Gilbey and imported from Scotland into the United States and the State of Kentucky 51,070.94 proof gallons of Gilbey's Spey Royal Scotch Whiskey.

For each act of importation, the taxpayer, acting under the requirements of K.R.S. 243.680 (2), applied to and received from the Department of Revenue of the Commonwealth of Kentucky an import permit authorizing the taxpayer to bring into Kentucky from Scotland the quantity of Scotch whiskey shown on the permit. As a condition precedent to the issuance of said import permits, the Department collected from the taxpayer import taxes at the rate of ten cents per proof gallon for each proof gallon shown on the permit.

Following are the several dates of issuance of said import permits by the Commonwealth of Kentucky, the quantities of Scotch whiskey imported into Kentucky under each of said permits and the amount of the import tax collected by the Kentucky Department of Revenue as a condition precedent to the issuance of each of said permits.

Permit No.	Date of Issuance	Proof Gals.	Tax Paid
58569	Sep. 29, 1959	6434.80	643.48
58849	Oct. 20, 1959	5968.00	596.80
58934	Oct. 26, 1959	6013.80	601.38
59096	Nov. 9, 1959	2291.52	229.15
59097	Nov. 9, 1959	17990.70	1,799.07
59402	Nov. 30, 1959	208.32	20.83
60611	Mar. 16, 1960	9120.00	912.00
60715	Mar. 24, 1960	3043.80	304.38
	Totals	51070.94	5,107.09

All of the aforesaid Scotch whiskey was loaded on shipboard by the vendor at Glasgow, Scotland and entered the United States at the ports of Chicago and New Orleans; was shipped by common carrier to Louisville where it was received by Robert Ice Truck Lines of Shepherdsville, Ken-

tucky and transported by truck, belonging to said truck lines, from Louisville to Clermont, Kentucky where it was [fol. 10] all received in original packages by the taxpayer into its Class 2 and 8 U. S. Customs Bonded Warehouses.

At the time of the receipt of said whiskey into its Class 2 and 8 U. S. Customs Bonded Warehouses, the Commonwealth of Kentucky had collected and the taxpayer had paid all of the Kentucky import taxes listed above. As evidence of said collection and payment, the taxpayer files herewith photostats of the several permits which granted the taxpayer the right to bring into the Commonwealth of Kentucky the Scotch whiskey described therein; and showing the amount of the tax paid on each such act of importation.

Basis For Claim of Refund

1. Kentucky Revised Statutes 243.680 (2) reads as follows:

"(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

"(b) No railroad company or express company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

2. Section 243.680 (2) of Kentucky Revised Statutes is in conflict with Article I Sec. 10 Clause 2 of the Constitution of the United States which provides:

[fol. 11] "No State shall, without the consent of the Congress, lay any Imposts, or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports shall be

for the use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

3. All of the taxes paid to the Commonwealth of Kentucky by the taxpayer on whiskey which it has imported from Scotland have been collected from the taxpayer under the provisions of an unconstitutional statute. Taxpayer is therefore entitled to and hereby claims a refund of any and all of such taxes as have heretofore been paid or which may hereafter be paid by the taxpayer pursuant to the provisions of K.R.S. 243.680 (2) and the Regulations of the Department of Revenue promulgated thereunder.

Millard Cox, Attorney for James B. Beam Distilling Company, 1022 Kentucky Home Life Building, Louisville 2, Kentucky, Tel.—JU 3-0291.

Revenue Form 568
Revised 5-56

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 58569

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from W & A Gilbey LTD. Glasgow, Scotland
(Name) (Street and No.) (City) (State)

110 bbls. of Scotch whiskey 101 to 110 Proof

Quantity		Tax Paid	
1. Wine gallons	5305.4	4. Tax at 10¢ per proof gallon	$ 643.48
2. Proof	101 to 110	5. Less credit certificates attached	00
3. Proof gallons (1 x 2)	6436.8	6. Net remittance	$ 643.48

[fol. 12]

SUBMITTED IN APPLICATION

JAMES B. BEAM DISTILLING CO. DBA GLEN SPEY LTD.
Applicant

By M O Whelan
Atty-in-fact

Subscribed and sworn to before me this 28 day of September 19 59.

NOTARY PUBLIC Marguerite Corbett
My commission expires 4/26/60

Mail to: JAMES B. BEAM DISTILLING CO.
DBA GLEN SPEY LTD.
CLERMONT, KENTUCKY

Applicant's Kentucky License No. DT-157

IF DISTILLER
Registered Distillery No. DSP KY 230

2

ISSUED AS PERMIT at Frankfort, Kentucky,
this ____ day of SEP 29 1959, 19__

Not valid after DEC 29 1959, 19__

DEPARTMENT OF REVENUE
By: Froman Ratcliff
Supervisor, Alcoholic Beverage Taxes

12

6

Revenue Form 548
Revised 5-56

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 58849

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from W & A Gilbey LTD. Glasgow, Scotland
Vendor Street and No. City State

100 Barrels 101 to 110 Proof Scotch Whiskey

[fol. 13]

Quantity		Tax Paid	
1. Wine gallons	4052.6	4. Tax at 10¢ per proof gallon	$ 596.80
2. Proof	103 to 110	5. Less credit certificates attached	00
3. Proof gallons (1 x 2)	5968.0	6. Net remittance	$ 596.80

SUBMITTED IN APPLICATION

JAMES B. BEAM DISTILLING CO.
Applicant

By W. O. Nelson
Atty-in-fact

Subscribed and sworn to before me this 19 day of October 1959

NOTARY PUBLIC Marguerite Corbett
My commission expires 4/26/60

Applicant's Kentucky License No. DT-157

IF DISTILLER

Registered Distillery No. DSP KY 230

ISSUED AS PERMIT at Frankfort, Kentucky, this 2 day of OCT 20 1959

Not valid after JAN 20 1960

DEPARTMENT OF REVENUE

By: Froman Ratcliff
Supervisor, Alcoholic Beverage Taxes

Mail to: JAMES B. BEAM DISTILLING CO.
CLERMONT, KENTUCKY

13

10

Revenue Form D68
Revised 5-56

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 58934

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from W & A Gilbey LTD. Glasgow, Scotland
City State

100 bbls. Scotch whiskey 101 to 110 Proof

Quantity		Tax Paid	
1. Wine gallons	4894.1	4. Tax at 10¢ per proof gallon	$601.38
2. Proof	101 to 110	5. Less credit certificates attached	00
3. Proof gallons (1 x 2)	6013.8	6. Net remittance	$601.38

SUBMITTED IN APPLICATION

JAMES B. BEAM DISTILLING CO.
Applicant

By M. O. Mulcahy Atty-in-fact

Subscribed and sworn to before me this 23 day of October 1959

NOTARY PUBLIC Marguerite Corbett
My commission expires 4/26/60

Mail to: JAMES B. BEAM DISTILLING CO.
CLERMONT, KENTUCKY

Applicant's Kentucky License No. DT-157

IF DISTILLER
Registered Distillery No. DSP KY 230

ISSUED AS PERMIT at Frankfort, Kentucky,
this day of OCT 26 1959
Not valid after JAN 26 1960 19

DEPARTMENT OF REVENUE
By: Froman Ratcliff
Supervisor, Alcoholic Beverage Taxes

[fol. 14]

11

14

Revenue Form 540
Revised

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 59096

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from Gilbey Spey Limited, Glasgow, Scotland
Firm · City · State

1100 cs fifths Scotch whiskey 86.8 proof

Quantity		Tax Paid	
1. Wine gallons	2640.00	4. Tax at 10¢ per proof gallon	$ 229.15
2. Proof	86.8	5. Less credit certificates attached	00
3. Proof gallons (1 x 2)	2291.52	6. Net remittance	$ 229.15

SUBMITTED IN APPLICATION

JAMES B. BEAM DISTILLING CO.
Applicant

By M. O. Whelan
Atty-in-fact

Subscribed and sworn to before me this 4 day of November 1959.

NOTARY PUBLIC
My commission expires 4/26/60

Applicant's Kentucky License No. DT-157

IF DISTILLER
Registered Distillery No. DSP KY 230

ISSUED AS PERMIT at Frankfort, Kentucky,

this ______ day of NOV 9 1959

Not valid after FEB 9 1960

DEPARTMENT OF REVENUE

By: Froman Ratcliff

Supervisor, Alcoholic Beverage Taxes

Mail to: JAMES B. BEAM DISTILLING CO.
CLERMONT, KENTUCKY

15

[fol. 15]

12

Revenue Form 848
Revised 5-56

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 50097

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from Gilbey Group Limited, Glasgow, Scotland
Vendor — Street and No. — City — State

300 barrels Scotch whiskey 121 Proof

Quantity		Tax Paid	
1. Wine gallons	14771.6	4. Tax at 10¢ per proof gallon	$ 1,799.07
2. Proof	121	5. Less credit certificates attached	@
3. Proof gallons (1 x 2)	17990.7	6. Net remittance	$ 1,799.07

SUBMITTED IN APPLICATION

JAMES B. BEAM DISTILLING CO.
Applicant

By M O Whelan
Atty-in-fact

Subscribed and sworn to before me this 4 day of November 1959.

NOTARY PUBLIC
My commission expires 4/26/60

Mail to: JAMES B. BEAM DISTILLING CO.
CLERMONT, KENTUCKY

Applicant's Kentucky License No. DT-157

IF DISTILLER
Supervisor No. DSP KY 230

ISSUED AS PERMIT at Frankfort, Kentucky,
this 2 day of NOV 9 1959

Not valid after FEB 9 1960 19

DEPARTMENT OF REVENUE
By: Froman Rateliff

Supervisor, Alcoholic Beverage Taxes

16

[fol 16]

13

Revenue Form 848
Revised 8-56

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 59402

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from Gilbey Spey Limited (Vendor) Glasgow, (Street and No.) Scotland (City) (State)

100 cs. Fifths (Quantity) Gilbeys Spey Royal, 12 yr. 86.8 proof. (Kind and Proof)

1. Wine gallons	240.00	4. Tax at 10¢ per proof gallon	$ 20.83
2. Proof	86.8	5. Less credit certificates attached	
3. Proof gallons (1 x 2)	208.32	6. Net remittance	$ 20.83

SUBMITTED IN APPLICATION

JAMES B. BEAM DISTILLING CO.
Applicant

By M C Nolan
ATTORNEY IN FACT

Subscribed and sworn to before me this 25th day of November 1959

NOTARY PUBLIC Marguerite Cabell
MY COMMISSION EXPIRES APRIL 26, 1960.

Mail to:
JAMES B. BEAM DISTILLING CO.
CLERMONT, KENTUCKY

Applicant's Kentucky License No. DT-157

IF DISTILLER
Distiller's Registry No. DSP-KY-230

ISSUED AS PERMIT at Frankfort, Kentucky,
this ____ day of NOV 30 1959 19__
Not valid after FEB 30 1960 19__

DEPARTMENT OF REVENUE
By: Froman Rateliff
Supervisor, Alcoholic Beverage Taxes

17

[fol. 17]

14

Revenue Form 548
Revised 5-56.

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 60611

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from W & A Gilbey Ltd. London, England, C/O Collecto of Customs, New Orleand, La.
Vendor — Street and No. — City — State

150 Bbls Scotch Whiskey 125 Proof

Quantity		Tax Paid	
1. Wine gallons	7,296.0	4. Tax at 10c per proof gallon	$ 912.00
2. Proof	12.5	5. Less credit certificates attached	00
3. Proof gallons (1 x 2)	9,120.0	6. Net remittance	$ 912.00

SUBMITTED IN APPLICATION

JAMES B. BEAM DISTILLING CO.
Applicant

By W. O. Whelan
Atty-in-fact

Subscribed and sworn to before me this 15 day of March 19 60

NOTARY PUBLIC Marguerite Corbett
My Comm. Expires 4/20/60

Mail to: JAMES B. BEAM DISTILLING CO.
CLERMONT, KENTUCKY

Applicant's Kentucky License No. DT-157

IF DISTILLER
Registered Distillery No. DSP KY 230

ISSUED AS PERMIT at Frankfort, Kentucky,
this MAR 16 1960 day of , 19

Not valid after JUN 16 1960 19

DEPARTMENT OF REVENUE
By: Froman Ratcliff
Supervisor, Alcoholic Beverage Taxes

[fol. 19]

15

18

Revenue Form 948
Revised 9-56

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 60215

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from W. A. Gilbey Ltd. London England, C/O Collects of Customs, New Orleans, La.
Vendor — Street and No. — City — State

50 Ebln Scotch Whiskey 125 Proof

Quantity		Tax Paid	
1. Wine gallons	2,435.0	4. Tax at 10c per proof gallon	$ 304.38
2. Proof	125	5. Less credit certificates attached	00
3. Proof gallons (1 x 2)	3,043.8	6. Net remittance	$ 304.33

SUBMITTED IN APPLICATION

JAMES B. BEAM DISTILLING CO.
Applicant

By M C Tilliam
Atty-In-Fact

Subscribed and sworn to before me this 22 day of March 19 60

NOTARY PUBLIC Marguerite C. T
My comm. expires 4/26/60

Mail to: JAMES B. BEAM DISTILLING CO.
CLERMONT, KENTUCKY

Applicant's Kentucky License No. DT- 157

IF DISTILLER
Registered Distillery No. DSP KY 230

ISSUED AS PERMIT at Frankfort, Kentucky,
this ____ day of MAR 24 1960

Not valid after JUN 24 1960 19

DEPARTMENT OF REVENUE
By Froman Ratcliff
Supervisor, Alcoholic Beverage Taxes

19

[fol 19]

16

[fol. 20] [File endorsement omitted]

BEFORE THE KENTUCKY TAX COMMISSION

AFFIDAVIT OF MRS. RUTH B. CAREY, LICENCED U. S. CUSTOM HOUSE BROKER—Filed November 14, 1960

The affiant, Mrs. Ruth B. Carey, states that she is a resident of Louisville, Jefferson County, Kentucky, that for sixteen years she has engaged in the business of Custom House Broker and is duly licensed to act as such under rules and regulations prescribed by the Secretary of the Treasury of the United States pursuant to the authority contained in 19 U.S.C. §1641; that a licensed Custom House Broker must be a person of good moral character, possessing such special knowledge of Customs Laws and Regulations as will qualify him to render valuable service to importers and exporters.

Affiant states that she has represented James B. Beam Distilling Company of Clermont, Kentucky for the past year as its Custom House Broker in the connection with said distilling company's importation of Gilbey's Spey Royal Scotch Whiskey from Glasgow, Scotland to Clermont, Kentucky; that she is familiar with all of the procedures by which said importations have been made and that the following step by step narrative account sets forth in essential detail the manner of importation and the procedures followed in accomplishing same:

1. The American importer of Scotch whiskey must be the holder of a "basic permit" issued pursuant to the authority contained in the Federal Alcohol Administration Act (27 U.S.C. 201-211) and Regulations 1 Sub-part C §1.20 reading as follows:

"§1.20 IMPORTERS.—No person, except pursuant to a basic permit issued under the act, shall:

"(a) Engage in the business of importing into the United [fol. 21] States distilled spirits, wine, or malt beverages; or, (b) while so engaged, sell, offer or deliver for sale, contract

to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so imported."

2. The "basic permit" referred to above means a formal document issued under the Federal Alcohol Administration Act in the form prescribed by the Director, Alcohol and Tobacco Tax Division, Department of the Treasury, authorizing the person named therein to engage in the activities specified at the location stated. (F.A.A. Regulations 1—§1.9)

3. James B. Beam Distilling Company, hereinafter referred to as "Taxpayer", is the holder of F.A.A. Basic Import Permit CIN-1-131.

4. As a licensed importer, Taxpayer imports from Scotland, Scotch whiskey in casks and bottled cases for sale and distribution in the United States.

5. Taxpayer is the importer of the brand of Scotch whiskey known as "Gilbey's Spey Royal" of which W. A. Gilbey Ltd. of London, England is the distiller and exporter.

6. Upon receipt of an order by Taxpayer, Gilbey fills same by loading the whiskey on shipboard at Glasgow, Scotland whence it customarily proceeds across the Atlantic Ocean and via the St. Lawrence Seaway to the City of Chicago, the port of entry into the United States. Said whiskey is consigned to James B. Beam Distilling Company, Clermont, Kentucky.

7. Upon arrival at Chicago, or other port of entry, the Master of the vessel carrying the Scotch whiskey consigned to Taxpayer is required by U. S. Customs laws to fill out a manifest on a form prescribed by the Secretary of the Treas- [fol. 22] ury. The manifest, sworn to and signed by the Master, must show: (1) The name of the port at which the merchandise was taken on board and the port of entry of the United States for which the same is destined, particularly describing the merchandise destined for the particular U. S. port of entry; (2) The name, description and build of the vessel, the true measure of the tonnage thereof, the port

to which the vessel belongs and the name of the Master of such vessel; (3) A detailed account of all merchandise on board such vessel, with the marks and numbers of each package and the number and description of the packages according to their usual names, such as barrel, keg, hogshead, case or bag; (4) The names of the persons to whom such packages are respectively consigned in accordance with the bills of lading issued therefor. (19 U.S.C. §1431)

8. Upon arrival of the whiskey at the port of entry, the importer is required to submit to the steamship line the signed original bill of lading denoting his ownership of the merchandise described therein.

9. Upon compliance with the foregoing requirement, the whiskey is then unloaded, received in customs, and entered for transportation in bond to Louisville under prescribed customs laws and regulations (See 19 U.S.C. §1552)

10. The whiskey is received at the port of entry by a transportation company duly designated by the Secretary of the Treasury as a carrier of bonded merchandise under the provisions of 19 U.S.C. §1551 and transported to Louisville and from there to Clermont, Bullitt County, Kentucky where it is received in its original packages in Taxpayer's U. S. Customs Private Bonded Warehouses established under the provisions of 19 U.S.C. §1555, where the whiskey remains in the sole custody of U. S. Customs officials under [fol. 23] bond until all U. S. taxes and duties have been paid thereon.

11. The taxes and duties are: (1) the tariff or import duty of $1.27 per U. S. proof gallon on Scotch whiskey 100° or more in proof and $1.27 per wine gallon if the whiskey is under 100° U. S. proof (Tariff Act of 1930 as amended by Trade Agreement Acts and Executive orders made pursuant thereto); and (2) U. S. Internal Revenue Tax at the rate of $10.50 per proof gallon. (26 U.S.C. §5001)

12. Before the imported whiskey can be brought from the port of entry into Kentucky, Taxpayer must apply to the Kentucky Department of Revenue for a Kentucky import

permit under the provisions of K.R.S. 243.680 (2) and Regulation PN-13 issued January 16, 1952 and reading as follows:

"No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining an import permit, Revenue Form 548, either tax-paid or tax-free, from the Department of Revenue showing that payment of required taxes has been made.

"No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits unless a copy of the import permit, Revenue Form 548, which has been attested by an official of the Department of Revenue, accompanies the shipment of distilled spirits into the state and is delivered to the consignee with the shipment.

"No Kentucky licensee shall receive on his premises any shipment of distilled spirits from any Kentucky licensed transporter, railway company, railway express company, boat line, air express company, or any other type of Kentucky licensed carrier, unless copy of the import permit, Revenue Form 548, which has been attested by an official [fol. 24] of the Department of Revenue, accompanies the shipment.

"More than one attested carrier's copy of an import permit may be issued by the Department of Revenue if request is included with application.

"Holders of import permits are required to return all carriers' copies to the Department of Revenue within 90 days from date of issuance. Permits not entirely used shall be returned to the department for credit. Failure to send in all carriers' copies of import permits within the 90-day period will necessitate withholding the issuance of additional import permits until all delinquent copies are returned to the department. If a permit is lost, satisfactory evidence shall be furnished the department in lieu of the permit."

13. Some of the Scotch whiskey imported by Taxpayer is received as originally packaged in Scotland in cases of 12 bottles each and some in the original barrels or casks in which it was shipped from Scotland. That which is brought in in cases is ready for the consumer market following pay-

ment of the Cutoms Duties and U. S. Internal Revenue Tax. The whiskey received in their original barrels or casks from Scotland cannot be sold in the U. S. consumer market until bottled and cased in conformity with U. S. Internal Revenue Laws and Regulations.

14. As to the latter whiskey, i.e. that which is imported in barrels, the Taxpayer makes application to the Collector of Customs in Louisville for permission to withdraw the barrelled whiskey from the bonded warehouse for bottling. Permission is received and the Collector of Customs assigns a Customs Inspector to gauge the whiskey and compute the Import Duties and Internal Revenue taxes due thereon. When the gauge is complete and the duties and taxes paid, [fol. 25] the Taxpayer removes the whiskey from the Customs Bonded Warehouse into its bottling house where, under supervision of a U. S. Storekeeper Gauger, it is reduced in proof to 86.8° by the addition only of distilled water, bottled, labeled, and cased in conformity with applicable U. S. Federal laws and regulations. The whiskey is then ready to be sold on order into the consumer market of the United States.

Mrs. Ruth B. Carey

Subscribed and sworn to before me by Mrs. Ruth B. Carey, this 11th day of November 1960. My commission expires Nov. 9, 1961.

Corinne S. Harrison, Notary Public, Jefferson County, Kentucky.

[fol. 26] [File endorsement omitted]

BEFORE THE KENTUCKY TAX COMMISSION
COMMONWEALTH OF KENTUCKY

RESPONSE TO THE PETITION FOR REVIEW OF THE ACTION OF THE DEPARTMENT OF REVENUE IN DENYING A REFUND OF CERTAIN "IMPORT" TAXES PAID BY JAMES B. BEAM DISTILLING COMPANY UNDER THE PROVISIONS OF KRS 243.680 (2) AND STATEMENT OF THE DEPARTMENT OF REVENUE POSITION—Filed January 5, 1961

In response to the Petition of James B. Beam Distilling Company as styled in the caption above, comes William E. Scent, Commissioner of Revenue, for the Commonwealth of Kentucky, and states that the tax in question levied by KRS 243.680 (2) is a license or excise tax on the right to carry on that part of the business conducted by James B. Beam Distilling Company which consists in part of the handling, mixing, processing and selling whiskey manufactured outside of the Commonwealth of Kentucky, including whiskey manufactured in Scotland.

The respondent states that such business is a separate and distinct business from that of manufacturing whiskey within the State of Kentucky, and, as such, is subject to the revenue laws of Kentucky as well as the police regulations of Kentucky.

The tax imposed by Section KRS 243.680 (2), to wit:

"(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

"(b) No railroad company or express company shall receive for shipment or ship into this state any package [fol. 27] or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department.

"(d) A railroad or express company need not obtain a permit to transport distilled spirits, but shall be subject to all regulations of the department."

is imposed on whiskey or other distilled spirits that has not borne the tax imposed by KRS 243.680 (1), to wit:

"No person shall manufacture distilled spirits in this state unless he first obtains from the department a permit to engage in the business of manufacturing distilled spirits. At the time of the issuance of the permit he shall pay to the state a tax of ten cents for each proof gallon of distilled spirits for which the permit is issued."

on whiskey or other distilled spirits manufactured in Kentucky.

The respondent says the tax in question is governed and imposed by KRS 243.690 (1) and (2) which reads:

"(1) No person shall engage in the business of blending, rectifying or mixing distilled spirits, without obtaining from the department a permit to blend, rectify or mix distilled spirits. An excise tax of ten cents is imposed for each proof gallon of distilled spirits that has not borne the tax imposed by KRS 243.680 and which is used in said blending, rectifying or mixing.

"(2) A person engaging in the business of blending, rectifying or mixing distilled spirits shall report on or before the tenth day of the succeeding month, in such form and stating such facts as may be prescribed by the department, the amount of the distilled spirits blended, rectified or mixed during the preceding month. At the time of making the report, he shall pay the tax due under this section."

[fol. 28] The tax in question is absolutely necessary for the execution of the state's regulatory and inspection laws concerning the shipment, sale and handling of distilled spirits within its borders.

The bottled scotch whiskey mentioned in the Petition for Review is offered for sale to any authorized purchaser. It has become part of the mass of property within Kentucky. The state's right to tax the whiskey in its present status is the same as the state's right to tax any other property, or the state's right to license the business of engaging in the sale or mixing or bottling of such distilled spirits or whiskey.

The said whiskey, both barrelled and bottled, is being put to the use for which it was imported. It has ceased to be within the classification of "imports" and any immunity which it might have had in that status is at an end when the state's right to tax begins as above stated.

The regulations and the laws of Kentucky apply to the entire process of carrying on such business from the time the whiskey enters the State of Kentucky until it reaches the final consumer or other authorized purchaser, or is shipped out of the State of Kentucky.

The tax in question and the permit issued on the payment thereof authorizes the conduct of a business separate, distinct and peculiar and, in its many aspects, differing from the business of manufacturing distilled spirits within Kentucky.

A great portion of the whiskey involved in the present hearing is in barrels of 125 proof. It must of necessity be [fol. 29] reduced in proof to 86.8° by adding and mixing with distilled water. Then it must be bottled and labeled in conformity with the Federal laws and the laws of Kentucky before it can be sold.

The tax in question is not a tax on imports. It is collected at time of entry into Kentucky only because that point constitutes the most expeditious and practical time of collection. Payment of the tax is thus made simultaneous with the permit to engage in the business which is provided for by KRS 243.690 (1). (Subsection (2), of course, imposes

the tax in question.) The tax and permit also provide the state with the proper control of the passage of distilled spirits from entry into its borders until final disposition. Such tax also equalizes the tax burden between distilled spirits which are manufactured in Kentucky and those manufactured outside of Kentucky when sold in Kentucky on the competition market.

The statutes above involved concerning the general subject of taxation on distilled spirits must be read and considered under the pari materia doctrine.

The tax in question was first imposed by Act of 1934, Chapter 149, page 666 of the Acts of that session of the Legislature; the amount of tax was raised by an Act of the 1956 Legislature, Chapter 114, page 210 of the Acts of that session. Neither by title nor text do those Acts seek to impose a tax on imports.

Paul Ross, Hal O. Williams, for the Department of Revenue.

[fol. 30] [File endorsement omitted]

BEFORE THE KENTUCKY TAX COMMISSION

AGREEMENT TO SUBMIT—Filed January 9, 1961

By agreement of the parties this case is submitted to the Kentucky Tax Commission on James B. Beam Distilling Company's Petition for Review of the Department of Revenue's action denying a refund and the Affidavit of Mrs. Ruth B. Carey and upon the Department's response thereto.

Millard Cox, Attorney for James B. Beam Distilling Company.

Paul D. Ross, Hal Williams, Attorneys for the Department of Revenue.

[fol. 31] [File endorsement omitted]

BEFORE THE KENTUCKY TAX COMMISSION

JAMES B. BEAM DISTILLING COMPANY, Petitioner,

vs.

DEPARTMENT OF REVENUE, Respondent.

ORDER No. 2,861—Dated February 1, 1961

By agreement of the parties, this cause is submitted before the Kentucky Tax Commission on the record consisting of the following:

A. James B. Beam Distilling Company's Petition for Review of the action of the Department of Revenue denying a refund of taxes paid under the provisions of KRS 243.680(2) filed June 16, 1960.

B. "Statement of Facts" by the petitioner filed April 27, 1960, and exhibits.

C. Affidavit of Mrs. Ruth B. Carey for Petitioner filed November 14, 1960.

D. Response of Department of Revenue to petitioner's Petition for Review filed January 5, 1961.

E. Agreement of Submission entered January 9, 1961.

Whereupon, the Kentucky Tax Commission affirms the ruling of the Department of Revenue and denies the petitioner's claim to a refund.

This the 1st day of February, 1961.

THE KENTUCKY TAX COMMISSION

William E. Scent, Chairman

Attest:

Georgia Moffett, Secretary

[fol. 32]

CERTIFICATION

I, Georgia Moffett, Secretary of the Kentucky Tax Commission, do hereby certify that the foregoing Petition for Review with Statement of Facts incorporated in such Petition by Paragraph 1 of the Petition; Affidavit of Mrs. Ruth B. Carey, Licensed U. S. Custom House Broker; Response to Petition for Review; Agreement to Submit; and a copy of Kentucky Tax Commission Order No. 2,861 constitute the true and complete record in the case of James B. Beam Distilling Company v. Department of Revenue.

This the 10th day of February, 1961.

Georgia Moffett, Secretary, The Kentucky Tax Commission.

Subscribed and sworn to before me by Georgia Moffett, Secretary of the Kentucky Tax Commission, this the 10th day of February, 1961.

Joyce A. Marse, Notary Public, State-At-Large.

My commission expires: March 29, 1964.

[fol. 33] [File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT

Civil Action File No. .....

(Title Omitted)

AGREED ORDER OF SUBMISSION—Filed February 10, 1961

Come the parties hereto by counsel and agree that this action shall be submitted on the original record as made before the Department of Revenue and the Kentucky Tax Commission. Said record consisting of the following documents is filed herewith:

1. James B. Beam Distilling Company's Petition for Review of the action of the Department of Revenue denying a refund of taxes paid under the provisions of KRS 243.680(2) filed June 16, 1960.

2. "Statement of Facts" by the Petitioner filed April 27, 1960, and exhibits.

3. Affidavit of Mrs. Ruth B. Carey for Petitioner filed November 14, 1960.

4. Response of Department of Revenue to Petitioner's Petition for Review filed January 5, 1961.

5. Agreement of Submission entered January 9, 1961.

[fol. 34] 6. Kentucky Tax Commission Order No. 2861 dated February 1, 1961.

Millard Cox, Attorney for Petitioner.

William S. Riley, Hal Williams, Paul D. Ross, Attorneys for Respondent.

[fol. 35] [File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT

Civil Action No. 60459

JAMES B. BEAM DISTILLING CO.,

Petitioner,

vs.

DEPARTMENT OF REVENUE,

Respondent.

MEMORANDUM OPINION—June 6, 1961

The "production" tax on distilled spirits is not a tax on "importation" within the meaning of Import-Export Clause of the Federal Constitution. It is not, in the language of the Act, an "import" tax at all, but merely so headed by the reviser of statutes.

By the language of the Act the things sought to be done by plaintiff and which are sought to be taxed by defendant are unquestionably subject to the police power of the State. Whether the point of origin of spirits shipped or transported into this State be Scotland or Indiana is immaterial, as the basis for the levy is not the character of the property, nor the source of its origin, but the privilege of conducting a certain type of business.

When the production resulting from operation of that type of business occurs in Kentucky it is subject to the same kind of tax, long held to be a license tax, measured by the volume of production.

Here, the only difference occurring in the course of the business sought to be subjected to the license tax is that the production or manufacture is accomplished outside of Kentucky and then brought into the State in furtherance of the licensed business. Considering the section (KRS 243.080) as a whole, and the undoubted right of the State, in the exercise of the police power, to prohibit absolutely [fol. 36] and entirely any occupation dealing with or traf-

ficking in distilled spirits, it must follow that nonconfiscatory revenue regulation of such business is within the State's plenary power.

The action of the Kentucky Tax Commission denying plaintiff's claim for refund of tax paid on permits for transporting Scotch whiskey into Kentucky is affirmed.

This 6th day of June, 1961.

Henry Meigs, Judge, Franklin Circuit Court.

[fol. 37] [File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT

Civil Action No. 60459

JAMES B. BEAM DISTILLING COMPANY,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF KENTUCKY,

Respondent.

JUDGMENT—June 9, 1961

This cause having been submitted upon record made before the Kentucky Tax Commission and upon briefs by respective counsel, the Court being sufficiently advised hereby makes the following findings of facts and conclusions of law, to wit:

Findings of Fact

1. The petitioner, James B. Beam Distilling Company, is a corporation organized under the laws of Illinois to engage in the business of manufacturing, warehousing, bottling, distilling and sale of distilled spirits products with a business situs in Kentucky.

2. Pursuant to permits issued by the United States Government and the Commonwealth of Kentucky, the peti-

tioner operates plants at Clermont and Beam in Bullitt and Nelson Counties, Kentucky.

[fol. 38] 3. During the year 1959, the petitioner entered into an agreement with W. A. Gilbey, Limited, of London, England, whereby the petitioner was granted exclusive right to buy from Gilbey, for importation, sale and distribution in the United States, Gilbey's product known as Gilbey's Spey Royal Scotch Whiskey.

4. Between the dates of September 1, 1959, and April 1, 1960, the petitioner purchased from Gilbey and imported into the Commonwealth of Kentucky 51,070.94 proof gallons of the aforesaid scotch whiskey.

5. Pursuant to KRS 243.680 (2), petitioner applied to and received from the respondent permits to transport into the Commonwealth of Kentucky the aforesaid scotch whiskey.

6. Pursuant to the provisions of KRS 243.680 (2) the petitioner paid the tax provided for therein at the rate of 10¢ per proof gallon as appears on copies of the permits filed of record.

7. The aforesaid scotch whiskey was shipped from Glasgow, Scotland, into the Commonwealth of Kentucky.

8. On April 27, 1960, the petitioner filed with the respondent an application for refund of taxes paid as aforesaid.

9. The basis for the petitioner's application for refund is that the taxes collected are in violation of Article I, Section 10, Clause 2, of the Constitution of the United States.

10. By its final ruling dated June 10, 1960, the respondent denied the petitioner's application for refund.

[fol. 39] 11. On June 16, 1960, the petitioner appealed the foregoing final ruling to the Kentucky Tax Commission.

12. By its Order No. 2,861, the Kentucky Tax Commission affirmed the ruling of the Department of Revenue and denied the petitioner's claim to a refund.

13. On February 9, 1961, the Petitioner appealed the foregoing Kentucky Tax Commission Order to the Franklin Circuit Court.

Conclusions of Law

1. The "production" tax on distilled spirits is not a tax on "importation" within the meaning of Import-Export Clause of the Federal Constitution. It is not, in the language of the Act, an "import" tax at all, but merely so headed by the reviser of statutes.

2. By the language of the Act the things sought to be done by petitioner and which are sought to be taxed by respondent are unquestionably subject to the police power of the State. Whether the point of origin of spirits shipped or transported into this State be Scotland or Indiana is immaterial, as the basis for the levy is not the character of the property, nor the source of its origin, but the privilege of conducting a certain type of business.

3. When the production resulting from operation of that type of business occurs in Kentucky it is subject to the same kind of tax, long held to be a license tax, measured by the volume of production.

[fol. 40] 4. The only difference occurring in the course of the business sought to be subjected to the license tax is that the production or manufacture is accomplished outside of Kentucky and then brought into the State in furtherance of the licensed business. Considering the section (KRS 243.680) as a whole, and the undoubted right of the State, in the exercise of the police power, to prohibit absolutely and entirely any occupation dealing with or trafficking in distilled spirits, it must follow that nonconfiscatory revenue regulation of such business is within the State's plenary power.

5. The action of the Kentucky Tax Commission denying petitioner's claim for refund of tax paid on permits for transporting scotch whiskey into Kentucky is proper.

6. Order No. 2,861 of the Kentucky Tax Commission is adequately supported by the law and the evidence.

7. Petitioner's appeal is, therefore, without merit and should be dismissed.

Wherefore, it is hereby ordered and adjudged that this appeal be and the same is hereby dismissed; that Order No. 2,861 of the Kentucky Tax Commission be and the same is hereby affirmed; that the respondent recover from the petitioner their costs herein expended.

This the 9th day of June, 1961.

Henry Meigs, Judge, Franklin Circuit Court.

[fol. 41] Have Seen:

Millard Cox, Attorney for Petitioner.

William S. Riley, Paul D. Ross, Hal Q. Williams, Attorneys for Respondent.

[fol. 42] [File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT

Civil Action No. 60459

[Title omitted]

STIPULATION AS TO RECORD—Filed June 27, 1961

Come the parties hereto by Counsel pursuant to C. R. 75.06 and stipulate that the record herein on appeal to the Court of Appeals shall consist of the entire original record, and the Clerk is hereby requested to prepare same for transmission to and filing in the office of the Clerk of the Court of Appeals including this Stipulation.

Millard Cox, Counsel for James B. Beam Distilling Company.

William S. Riley, Counsel for Department of Revenue.

Dated June 27th, 1961

[fol. 43] [File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT

Civil Action No. 60459

[Title omitted]

NOTICE OF APPEAL—Filed June 21, 1961

Notice is hereby given that Petitioner, James B. Beam Distilling Company, appeals to the Court of Appeals from the final Judgment of the Franklin Circuit Court entered in favor of Respondent, Department of Revenue, in this action on the 9th day of June 1961.

Millard Cox, Counsel for James B. Beam Distilling Co., 1022 Kentucky Home Life Building, Louisville 2, Kentucky, JUniper 3-0291.

Dated:

June 20, 1961

[fol. 44] [File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT

Civil Action No. 60459

[Title omitted]

ORDER RE PREPARATION AND TRANSMITTAL OF ORIGINAL RECORD—June 27, 1961

Pursuant to stipulation by the parties hereto and approval thereof by the Court, the Clerk is hereby directed to prepare for transmission and filing in the Office of the Clerk of the Court of Appeals the entire original record in this case.

HENRY MEIGS,
Judge.

Dated June 27, 1961

[fol. 45] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 46]

IN THE COURT OF APPEALS OF KENTUCKY

JAMES B. BEAM DISTILLING CO.,

vs.

DEPT. OF REVENUE.

MINUTE ENTRY—September 11, 1961

Came appellant by counsel, and filed briefs and notice.

[fol. 47]

MINUTE ENTRY—September 11, 1961

Came parties, by counsel, and filed agreement, treated as a joint motion for an extension of time to October 9, 1961, for appellee to file briefs, which motion is sustained. 9/7/61.

[fol. 48]

MINUTE ENTRY—October 13, 1961

Came appellee, by counsel, and filed briefs and notice.

The Court being sufficiently advised, the above styled case is ordered submitted October 13, 1961

[fol. 49]

MINUTE ENTRY—October 20, 1961

Came parties, by counsel, and filed joint motion to advance, which motion is sustained. 10/20/61.

[fol. 50]

IN THE COURT OF APPEALS OF KENTUCKY

JAMES B. BEAM DISTILLING COMPANY, Appellant,

vs.

DEPARTMENT OF REVENUE, Appellee.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, Judge

OPINION OF THE COURT BY CHIEF JUSTICE STEWART—
March 1, 1963

REVERSING

This is an appeal by James B. Beam Distilling Company from a judgment of the Franklin Circuit Court upholding a ruling of the Kentucky Tax Commission, which denied appellant's claim for a refund of taxes on distilled liquors. The sum of $5107.09 was paid to the Department of Revenue between September 1, 1959, and April 1, 1960, under the provisions of KRS 243.680(2), which reads:

"(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax [fol. 51] of ten cents on each proof gallon contained in the shipment.

"(b) No railroad company or express company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

Appellant's position is this statute is unconstitutional because it conflicts with article 1, section 10, clause 2 of the Constitution of the United States, which reads:

> "No State shall, without the consent of the Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

Appellant is the sole distributor in the United States of a brand of Scotch whisky called "Gilbey's Spey Royal." The whisky is produced in Scotland, received by appellant [fol. 52] at its Kentucky plant at Clermont in Nelson County by direct shipment from Scotland, and then sold by it to its customers in the domestic markets throughout this country. The record shows, which is not disputed, that this whisky is an import; that it has been brought in from another country; and that the tax was collected while the whisky remained in unbroken packages in the hands of the original importer and prior to resale or use by the importer.

Before appellant can bring this whisky into Kentucky, it must obtain a permit pursuant to KRS 243.680(2)(c); and, as a condition precedent to the issuance of the permit, it must pay a tax of 10¢ per proof gallon on the whisky to be imported.

Since the case of Brown v. Maryland, 12 Wheat, 419, 25 U. S. 419, 6 L. Ed. 678, the United States Supreme Court has held that the above-quoted constitutional provision, known as the "import-export clause," protects goods imported for sale while they are in their original packages and have not been sold or used by the importer. "Use" by the importer of such goods does not include their storage preparatory to sale. Storage does not cause the goods to lose their character as imports. This is true even if the goods, such as the liquor in the case at bar, will only be sold for delivery in Kentucky. See State v. Board of Review, City of Milwaukee, et al., 15 Wis. 2d 330, 112 N. W. 2d 914.

Even though the tax is denominated as something else, such as occupational tax (Brown v. Maryland, supra), an excise tax (Richfield Oil Corporation v. State Board of Equalization, 329 U. S. 69, 91 L. Ed. 80), or an ad valorem tax (Hooven & Allison v. Evatt, 324 U. S. 652, 89 L. Ed. (1252)), if, in fact, it is a tax on imports, as that term is interpreted by the Supreme Court of the United States, the [fol. 53] levy is invalid. The tax in the case at bar is an occupational or license tax in form, but appellant maintains it is nevertheless a tax on imports in fact.

Appellee argues that the Twenty-first Amendment to the Constitution of the United States has changed the rule regarding a state's right to tax imports. Section 2 of this amendment reads: "The transportation or importation into any state or territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." This point has been dealt with by courts of other jurisdictions.

In the case of Parrot & Co. v. San Francisco, Calif., 280 Pac. 2d 881, the City of San Francisco levied and collected an ad valorem property tax on some imported liquor which was still in its original unbroken packages, was stored in separate lots in warehouses and was undisposed of by the original importer by consignment or sale. That court held the second section of the amendment did not repeal the import-export clause of the Constitution of the United States insofar as intoxicating liquors are concerned. The opinion states:

> "• • • The two sections (of the amendment), in their application to foreign imported liquor, are quite clearly complementary. The import-export clause permits the federal government exclusively to regulate and tax all imports from foreign lands, including liquors, as long as they remain imports, but when the importation is completed and the liquor is being transported or imported into one of the states 'for delivery or use therein' the power of the state attaches. The obvious purpose [fol. 54] of the 21st amendment was to preserve the intra-state jurisdiction of the states so as to grant constitutional protection to those states desiring to remain or to become 'dry.'"

That court concluded such imported liquor was not subject to the city's ad valorem tax. A similar ruling was handed down by the Supreme Court of Wisconsin in State v. Board of Review, City of Milwaukee, supra, where the City of Milwaukee undertook to assess for the purpose of city taxation certain wines and liquors imported directly from various foreign countries. That court held that the assessment on the wines and liquors still in the original packages, unconsigned and unsold, violated the import-export clause and was therefore void.

Appellee contends it has authority to impose the tax under the Webb-Kenyon Act. See U. S. C. A., Title 27, Chapter 6. We do not agree. The two sections of this Act bestow upon the several states the power either to prohibit the transportation of any and all liquors into a state, if that particular state happens to be "dry," or to regulate the traffic in liquors within a state, if that particular state is "wet." Clearly this Act does not by its language confer upon a state the right to tax liquors in contravention of the import-export clause of the federal Constitution; furthermore, it was not the purpose of this Act to accomplish that purpose. The case of Carter v. Virginia, 321 U. S. 131, 88 L. Ed. 605, relied upon by appellee to sustain its right to levy the tax under consideration, simply does not, in our view, uphold any such right or imply in any wise that the import-export clause of the Constitution of the United States may be ignored where the taxation of direct [fol. 55] imports of foreign origin is involved.

It cannot be said the tax in question is an inspection measure, as appellee seems to suggest. Neither KRS 243.-680(2), nor the regulation implementing this statute, provides for actual inspection of the imported whisky. Actual inspection must be provided for in order that the statute may come under the exception noted in the import-export clause of the federal Constitution. See 29 Am. Jur., Inspection Laws, sec. 4, pp. 369-370. Kentucky makes no independent inspection of imported distilled spirits, but accepts the inspection made by the Alcohol & Tobacco Tax Division of the Bureau of Internal Revenue. See KRS 244.230.

In the final analysis, we conclude the language of KRS 243.680(2) makes it plain the incidence of the tax is the act of transporting or shipping the distilled spirits under consideration into this state. It is our opinion, under the facts presented and under the authority of the Wisconsin and the California cases, extensively referred to above, and the legal principles of both of which we adopt as the law of Kentucky, the whisky is not subject to the tax collected under KRS 243.680(2). It follows that appellant is entitled to the relief sought, namely, a refund of the amount heretofore paid.

Wherefore, the judgment is reversed and remanded for further proceedings not inconsistent with this opinion.

Attorney for Appellant: Millard Cox, 1021-1023 Ky. Home Life Bldg., Louisville 2, Kentucky.

Attorneys for Appellee: William S. Riley, Paul D. Ross, Hal O. Williams, Department of Revenue, Capitol Annex, Frankfort, Kentucky.

[fol. 57]

IN THE COURT OF APPEALS OF KENTUCKY

JAMES B. BEAM DISTILLING COMPANY, Appellant,

vs.

DEPARTMENT OF REVENUE, Appellee.

Appeal from a judgment of the Franklin Circuit Court.

JUDGMENT—March 1, 1963

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for proceedings not inconsistent with the opinion herein; which is ordered to be certified to said Court.

It is further considered that the appellant recover of the appellee, its costs herein expended.

[fol. 58]

IN THE COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—March 22, 1963

Came appellee, by counsel, and filed notice and motion for an extension of time to and including April 29, 1963 to file petition for rehearing.

[fol. 59]

MINUTE ENTRY—April 8, 1963

Came appellee, by counsel, and filed motion for an extension of time to and including April 29, 1963 to file petition for rehearing, which motion is sustained. 4/1/63.

[fol. 60]

MINUTE ENTRY—May 3, 1963

Came appellee, by counsel, and filed petition for rehearing and notice.

Came appellant, by counsel, and filed response to petition for rehearing and notice.

[fol. 61] PETITION FOR REHEARING (omitted in printing)—Filed April 29, 1963.

[fol. 62] RESPONSE TO PETITION FOR REHEARING (omitted in printing)—Filed May 3, 1963.

[fol. 63]

IN THE COURT OF APPEALS OF KENTUCKY

ORDER OVERRULING PETITION FOR REHEARING—May 24, 1963

The Court being sufficiently advised, it is considered that the petition of appellee for a rehearing be and the same is overruled.

[fol. 64] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 65]

SUPREME COURT OF THE UNITED STATES

No. 389—October Term, 1963

DEPARTMENT OF REVENUE, Petitioner,

vs.

JAMES B. BEAM DISTILLING COMPANY.

ORDER ALLOWING CERTIORARI—October 14, 1963

The petition herein for a writ of certiorari to the Court of Appeals of the Commonwealth of Kentucky is granted and the case is placed on the summary calendar. The case is set for oral argument immediately following No. 116.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Brennan took no part in the consideration or decision of this petition.

IN THE

Supreme Court of The United States

389

No.———

DEPARTMENT OF REVENUE ----------PETITIONER

v.

JAMES B. BEAM DISTILLING COMPANY-----RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

JOHN B. BRECKINRIDGE
Attorney General
Commonwealth of Kentucky

WILLIAM S. RILEY
Assistant Attorney General
Commonwealth of Kentucky

HAL O. WILLIAMS
PAUL D. ROSS
FRANCIS D. BURKE

ATTORNEYS FOR PETITIONER
Department of Revenue
Frankfort, Kentucky

INDEX

CITATIONS

IN THE

Supreme Court of The United States

No.————

DEPARTMENT OF REVENUE .....*Petitioner*

v.

JAMES B. BEAM DISTILLING COMPANY .....*Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, Commonwealth of Kentucky, by and on relationship of James V. Marcum, Commissioner of Revenue, Commonwealth of Kentucky, prays that a writ of certiorari issue to review a final opinion of the Court of Appeals of Kentucky, the highest appellate court of the Commonwealth of Kentucky, on May 24, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky was delivered initially on March 1, 1963, and petition for rehearing was overruled by said Court on May 24, 1963. The opinion is attached hereto as "Appendix A" and cited as Ky., 367 S.W. 2d 267.

JURISDICTION

Jurisdiction is vested in this Court under and pursuant to provisions of Title 28 U.S.C.A., Sec. 1257(3).

QUESTION PRESENTED

The question presented for review may be stated as follows:

Where a State has imposed a license or occupational tax upon distilled spirits manufactured within the State,

is it within the power of the State, consistent with Art. I, Sec. 10, Cl. 2, of the Constitution of the United States, to place an equal and like tax on distilled spirits imported within the State from a foreign country?

It is the contention of the petitioner that:

(1) KRS 243.680 (2) is not a tax upon the importation of the distilled spirits but is a tax upon the first possession of the distilled spirits within the State and that Art. I, Sec. 10, Cl. 2, of the Constitution, has no application for the reason that the importation is completed at the moment the tax attaches; and

(2) Assuming that the tax is upon importation, it is within the power of the State to tax this particular class of foreign imports.

STATUTES INVOLVED

Art. I, Sec. 10, Cl. 2, of the United States Constitution:

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States: and all such laws shall be subject to the revision and control of the Congress."

The Twenty-first Amendment, Constitution of the United States:

"Sec. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

27 U.S.C.A., Sec. 121:

"All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

KRS 243.680 (2):

"(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

"(b) No railroad company or express company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

KRS 243.990 (6):

"Any person who fails to pay the taxes imposed by KRS 243.680 to 243.700 within fifteen days after they have become due, shall pay a penalty of twenty percent on the amount of the tax due."

Regulation PN-13:

"No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining an import permit, Revenue Form 548, either tax-paid or tax-free, from the Department of Revenue showing that payment of required taxes has been made.

"No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits unless a copy of the import permit, Revenue Form 548, which has been attested by an official of the Department of Revenue, accompanies the shipment of distilled spirits into the state and is delivered to the consignee with the shipment.

"No Kentucky licensee shall receive on his premises any shipment of distilled spirits from any Kentucky licensed transporter, railway company, railway express company, boat line, air express company, or any other type of Kentucky licensed carrier, unless a copy of the import permit, Revenue Form 548, which has been attested by an official of the Department of Revenue, accompanies the shipment.

"More than one attested carrier's copy of an import permit may be issued by the Department of Revenue if request is included with application.

"Holders of import permits are required to return all carrier's copies to the Department of Revenue within 90 days from date of issuance. Permits not entirely used shall be returned to the department for credit. Failure to send in all carriers' copies of import permits within the 90-day period will necessitate withholding the issuance of additional import permits until all delinquent copies are returned to the department. If a permit is lost, satisfactory evidence shall be furnished the department in lieu of the permit."

STATEMENT

The General Assembly of the Commonwealth of Kentucky has enacted a comprehensive scheme of taxation and regulation of every facet of the production, transportation and sale of alcoholic beverages. These statutes may be found as Chapter 243 of the Kentucky Revised Statutes.

The facts under dispute may be found on pages 7-10 of the record in the Court of Appeals of Kentucky. We will adopt the respondent's statement of the facts appearing in their brief before the Court of Appeals of Kentucky verbatim. This statement is as follows:

> "The facts on which this suit for refund is based are fully stated in the record (R., pp. 7-10). Since they are not in dispute, a brief summary here will suffice.
>
> "The Taxpayer is a licensed distiller under both Federal and State laws. Taxpayer is also the holder of basic import permit (CIN-1-131) under the Federal Alcohol Administration Act, 27 U.S.C. 201-211. Its chief import is a brand of Scotch whiskey known as 'Gilbey's Spey Royal' for which it has the sole distributorship in the United States under a contract with the producer, W. A. Gilbey Ltd. of London, England, and Glasgow, Scotland.
>
> "The whiskey is received by the Taxpayer at its Kentucky plant at Clermont, Kentucky as a direct import from Glasgow, Scotland and then sold by Taxpayer to its customers in the domestic markets through-out the United States.
>
> "Before it can bring the whiskey into Kentucky, Taxpayer is required to apply for the permits provided for in K.R.S. 243.680 (2) and Regulation PN-13 *(supra)*; and as a condition precedent to the issuance of the permit the Taxpayer must pay a tax of ten cents per proof gallon for the privilege of making the importation. The language of K.R.S. 243.680 (2) makes it

plain that the incidence of the tax is the act of transporting or shipping the spirits into the state.

"Between the dates of September 1, 1959 and April 1, 1960, Taxpayer imported into Kentucky 51,070.94 proof gallons of Gilbey's Spey Royal Scotch whiskey on which it paid total taxes of $5,107.09 under the requirements of K.R.S. 243.680 (2).

"Parenthetically, and in order to avoid any confusion as to the question at issue, it needs to be stated at the outset that we are dealing here only with imports of distilled spirits of foreign origin. Imports from other states of the Union of domestically produced products are not here involved.

"Goods transported from one state to another are not 'imports' within the meaning of the Import-Export Clause of the U.S. Constitution. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 89 L.Ed. 1265 (1944).

"According to the report of the Department of Revenue for the fiscal year ending June 30, 1960, the Kentucky import tax yielded a total revenue of $755,629. Of this amount only a small fraction was derived from the tax on spirits brought into Kentucky from foreign countries.

"A request to the Department of Revenue for the most recent annual figures on the number of gallons of distilled spirits imported into Kentucky from foreign countries brought this reply:

> "'In response to your phone request we have checked with the Research Staff relative to a breakdown as to the quantity of distilled spirits imported into Kentucky from outside the United States and the quantity imported from other states within the United States.
>
> "'We have been informed that the Kentucky wholesalers have submitted to the Department a

breakdown on the types of distilled spirits purchased monthly. Without a verification of the report the clerical staff in the Research Division has been preparing a summary of the reports for submission to the Distilled Spirits Institute.

"Recent cross checking of reports have indicated that some of these reports have been erroneously prepared. A group of the wholesalers have included purchases made from other Kentucky wholesalers, thus creating a duplication on types. For this reason, the Department feels that a further release of summaries on purchases prepared from unverified reports would not be wise."

"As indicated above, the Department of Revenue's Research Division has been supplying the Distilled Spirits Institute of Washington, D. C. monthly reports of distilled spirits purchased by Kentucky wholesalers, broken down as to class and type. From these reports the Distilled Spirits Institute prepares a monthly and year end summary of Kentucky sales by class and type, showing the quantities of spirits of domestic origin and those imported from foreign countries. We have included as an appendix to this brief* the Distilled Spirits Institute report for the year ending December 31, 1960. This report indicates that the total number of proof gallons of distilled spirits of foreign origin imported into Kentucky for the calendar year 1960 was 201,508 proof gallons. On the basis of ten cents per proof gallon (the tax rate on imported spirits under K.R.S. 243.680 (2)) the total revenue from the import tax on spirits brought in from foreign countries was only $20,150.80.

"Should the Department of Revenue desire to submit its own estimate of the revenue involved, we will accept as conclusive the Department's calculation, as the difference, if any, can only be slight."

*See Appendix B.

REASONS FOR GRANTING THIS WRIT

The decision of the Court of Appeals of Kentucky has stricken down an occupational licensing tax on the business of bringing distilled spirits within the Commonwealth, the rectifying, bottling, and selling of such spirits. This tax has been adjudged to violate Art. I, Sec. 10, Cl. 2, of the United States Constitution. The Court of Appeals of Kentucky has stated unequivocally that the tax is a tax on imports.

KRS 243.680 (2) is not a tax on imports. We concede that KRS 243.680 (2), standing alone, would seem to indicate that a tax of ten cents per gallon of whiskey brought into the state must be paid before its introduction into the state. This subsection is, however, but one part of a statutory scheme of taxation. The entire statute must be considered under the pari materia doctrine.

KRS 243.990 (6) provides for a penalty if the tax imposed by KRS 243.680 (2) is not paid within fifteen days after the distilled spirits have entered the state. In short, the tax is not mandatorily required to be paid until its introduction into the state is complete.

Common sense construction makes it clear that the legislative intent was that one bringing distilled spirits into the state was not obligated to pay the tax until the distilled spirits had actually arrived in the state and not for fifteen days thereafter. As a matter of regulation and administrative convenience, the Department of Revenue requires the application for and the securing of permits in advance of the importation. In other words, one bringing whiskey into the state from any point outside the state is merely required to give advance notice of the proposed act. He is not required to pay the tax in advance of arrival.

In Ziffrin v. Reeves, Commissioner of Revenue, 308 U.S. 132, 84 L.ed. 128, 60 S. Ct. 163 (1939), this Court considered the entire matter of Kentucky's power over the shipment of distilled spirits into its borders. The Commonwealth of Kentucky had provided that any distilled spirits entering Kentucky that did not

follow designated routes of entry and passage would be considered contraband. In sustaining this power this Court said on page 135 of the Lawyers Edition:

> "Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less. . . ."

It further states in the opinion:

> ". . . The statute declares whiskey removed from permitted channels contraband subject to immediate seizure. This is within the police power of the state; and property so circumstanced cannot be regarded as a proper article of commerce. . . ."

On page 136 the Supreme Court says:

> "'. . . The police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter.'"

The Court of Appeals of Kentucky has heretofore agreed.

Commonwealth v. Williams,
287 Ky. 489, 153 S.W. 2d 985 (1941)

The respondent has bought the privilege of bringing into Kentucky, and conducting the business of selling, mixing, and handling, the whiskey in question, both in barrels and bottles. The fact that the whiskey may be of foreign origin is of no consequence for the respondent must comply with the rules and regulations under the police and taxing powers of the State.

The only case dealing with the precise factual circumstances here presented is that of Gordon v. Texas, 166 Tx. Cr. 24, 310 S.W.2d 328 (Texas, 1956), Aff'd per curiam, 355 U.S. 369, 2 L.ed.2d 352, 78 S.Ct. 363 (1958).

The Texas Statute, Art. 666-4 (a), Vernon's Ann. P.C., provides:

"It shall be unlawful for any person to manufacture, distill, brew, sell, possess for the purpose of sale, import into this state, export from the state, transport, distribute, warehouse, store, solicit orders for, take orders for, or for the purpose of sale to bottle, rectify, blend, treat, fortify, mix, or process any liquor in any wet area without first having procured a permit of the class required for such privilege."

Art. 666-8 of the same code provides:

"No person shall import into this State any liquor, in excess of one (1) quart, from any source unless a permit be first obtained from the Board, and any person so purchasing or importing liquor in violation of this Section shall be subject to the penalties as hereinafter provided. In addition to the penalities hereinafter provided, any person violating the provisions of this section shall forfeit the liquor so imported to the Board as here provided. . . ."

Art. 666-17 (32) provides:

". . . distilled spirits contained in a container having attached thereto the Federal Liquor Strip Stamp or imported from any foreign country are hereby subject to taxation, and must have affixed thereto the appropriate Texas Tax Stamp for distilled spirits."

Gordon had entered the United States from Hidalgo, Mexico, having in his possession eleven bottles, each containing one-fifth gallon of rum, which he had purchased in the Republic of Mexico. The Texas stamp had not been paid; Gordon was transporting the rum to his home in North Carolina. The appellant was convicted, and the Court of Appeals of Texas rejected his contention that his conviction violated Art. 1, Sec. 10, Cl. 2, of the Constitution of the United States. The Court said:

"It is apparent that the tax involved is not an import tax nor a tax upon importation. In fact, the instant tax could not become an import tax because the importation must have been completed before the tax here levied attached."

This Court, in affirming the opinion of the Texas court per curiam, cited the Twenty-first Amendment of the Constitution of the United States and its opinion in Carter v. Virginia, 321 U.S. 131, 88 L.ed. 605, 64 S.Ct. 464 (1944).

Carter v. Virginia, supra, dealt with the power of the state to regulate intoxicating beverages and the relationship of that power to the Commence Clause of the United States Constitution, Art. 1, Sec. 8, Cl. 3. The reasoning of Justice Frankfurter as set out in his concurring opinion in this case, however, is pertinent and persuasive here. As he stated at pp. 613 and 614 of 88 L.ed.:

> ". . . The Twenty-first Amendment prohibits the 'transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof,' not when the liquor is for delivery *and* use but for 'delivery *or* use therein.' In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore subject to control by that State. . . .
>
> ". . . In a word, having the power to prohibit liquor from coming into a State, a State may take measures against frustration of that power by resort to the claim that liquor passing through a State enjoys the protection of the Commerce Clause. If a State may take these protective measures, as surely it may, who is to decide what measures are necessary for its protection? If a State may ask for the posting of a $1,000 bond, may she not require a $10,000 bond? If a State should urge that its experience shows that any regulatory system is ineffective because illicit diversion is too resourceful for control by mere regulation and requires prohibition, who is to say, in view of the history embedded in the Twenty-first Amendment, that a State may not fairly act on such a judgment? Are not these peculiarly political, that is legislative, questions which were not meant by the Twenty-first Amendment to continue to be the fruitful apple of judicial discord, as they were before the Twenty-first Amendment?
>
> "6. It is now suggested that a State must keep within 'the limits of reasonable necessity' and 'that

this Court must judge whether or not Virginia has adopted 'regulations reasonably necessary to enforce its local liquor laws.' Such canons of adjudication open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which led first to the Eighteenth and then to the Twenty-first Amendment.

"7. Less than six years ago this Court rejected the impossible task of deciding, instead of leaving it for legislatures to decide, what constitutes a 'reasonable regulation' of the liquor traffic. The issue was fairly presented in Mahoney v. Triner Corp. 304 US 401, 82 L. Ed. 1424, 58 S. Ct. 952. And this was the holding:

" 'We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so would, as stated in the Young's Market Co.'s Case (299 US 59) p 62, 81 L. Ed 38, 40, 57 S.Ct. 77, "involve not a construction of the Amendment, but a rewriting of it." ' 304 US 404, 82 L.Ed. 1427, 58 S. Ct. 952.

"Therefore if a State, in aid of its powers of prohibition, may regulate, without let or hindrance by courts regarding the 'reasonableness' of a regulation, it may do so whether the liquor is openly consigned for consumption within it or intended for consumption there although, by subterfuge too difficult to check, nominally destined elsewhere.

". . . And since Virginia derives the power to legislate as she did from the Twenty-first Amendment, the Commerce Clause does not come into play. . . ."

We believe that the foregoing amply demonstrates on logic and reason that the tax imposed by KRS 243.680 (2) is not a tax on an import. Should the Court conclude, however, that the tax is on importation, it is submitted that it was within the power of the State to levy such a tax here.

The Twenty-first Amendment of the Constitution of the United States is nothing more or less than a reaffirmation of the State's powers with regard to alcohol. It creates no new powers but does nothing more than expressly permit a State to write the provisions under which intoxicating beverages may enter its borders.

The Wilson Act, known as the Original Package Act, 27 U.S.C.A., Sec. 121, provides in part as follows:

> "All . . . distilled . . . liquors . . . transported into any State . . . shall . . . be subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The power granted to a state to prohibit, regulate, or license the handling of liquors brought into its borders was not made to depend upon whether the spirits were imported from another state or a foreign country in either an original or broken package.

DeBary & Co. v. Louisiana,
227 U.S. 108, 57 L.ed. 441,
33 S.Ct. 239 (1913)

The tax imposed by KRS 243.680 (2), and the equivalent tax imposed on the manufacture of distilled spirits within the Commonwealth of Kentucky has been construed to be nothing more or less than an occupational licensing tax.

Brown-Forman Co. v. Commonwealth,
125 Ky. 402, 101 S.W. 321 (1907),
Aff'd, 217 U.S. 563, 54 L.ed. 883,
30 S. Ct. 578 (1910)

The force and effect of these constitutional and statutory provisions permit a State to place distilled spirits introduced into its borders on an equal footing with such spirits manufactured within its borders.

The tax here involved is not a tax upon the property. For this reason, all the cases relied upon by the Court of Appeals of Kentucky in striking down this tax are distinguishable for they involve the question of ad valorem property taxation.

> Parrott & Co. v. City and County of San Francisco, 131 Cal. App. 2d 332, 280 P. 2d 881 (1955); State v. Board of Review, City of Milwaukee, 15 Wis. 2d 330, 112 N.W. 2d 914 (1962)

It must be borne in mind that Art. I, Sec. 10, Cl. 2, of the Constitution of the United States, merely prohibits states in laying imposts or duties on imports or exports . . . without the consent of Congress. Entirely aside from the Twenty-first Amendment to the Constitution, Congress has, by the Original Package Act, consented to the States making their liquor laws adaptable to all intoxicating beverages, whether imported from a foreign country or not.

CONCLUSION

The Commonwealth of Kentucky collects ten cents per gallon on every gallon of distilled spirits manufactured within its borders. To permit a strained construction of Art. I, Sec. 10, Cl. 2, of the Constitution of the United States, to place distilled spirits imported from a foreign country in an exemptive or protected class, wholly escaping this facet of the statutory scheme of taxation and regulation, is to sacrifice the domestic industry on the altar of constitutional form.

We submit that the decision of the Court of Appeals of Kentucky misconstrues the effect of Art. I, Sec. 10, Cl. 2, of the Constitution of the United States in its application of the power of the States to regulate and tax foreign imports of whiskey.

We submit further that this Court should grant the petitioner's petition for Writ of Certiorari and that this matter should be heard on its merits.

Respectfully submitted,

JOHN B. BRECKINRIDGE
Attorney General
Commonwealth of Kentucky

WILLIAM S. RILEY
Assistant Attorney General
Commonwealth of Kentucky

HAL O. WILLIAMS
PAUL D. ROSS
FRANCIS D. BURKE

ATTORNEYS FOR PETITIONER
Department of Revenue
Frankfort, Kentucky

IN THE
SUPREME COURT OF THE UNITED STATES

No.———

DEPARTMENT OF REVENUE ----------PETITIONER

v.

JAMES B. BEAM DISTILLING COMPANY--------RESPONDENT

APPENDIX A

Court of Appeals of Kentucky

March 1, 1963

JAMES B. BEAM DISTILLING COMPANY ---------- *Appellant*

VS.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, JUDGE

DEPARTMENT OF REVENUE ---------- *Appellee*

OPINION OF THE COURT BY
CHIEF JUSTICE STEWART

REVERSING

This is an appeal by James B. Beam Distilling Company from a judgment of the Franklin Circuit Court upholding a ruling of the Kentucky Tax Commission, which denied appellant's claim for a refund of taxes on distilled liquors. The sum of $5107.09 was paid to the Department of Revenue between September 1, 1959, and April 1, 1960, under the provisions of KRS 243.680(2), which reads:

> "(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

"(b) No railroad company or express company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

Appellant's position is this statute is unconstitutional because it conflicts with article 1, section 10, clause 2 of the Constitution of the United States, which reads:

"No State shall, without the consent of the Congress, lay any imports, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imports, laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

Appellant is the sole distributor in the United States of a brand of Scotch whiskey called "Gilbey's Spey Royal." The whiskey is produced in Scotland, received by appellant at its Kentucky plant at Clermont in Nelson County by direct shipment from Scotland, and then sold by it to its customers in the domestic markets throughout this country. The record shows, which is not disputed, that this whiskey is an import; that it has been brought in from another country; and that the tax was collected while the whiskey remained in unbroken packages in the hands of the original importer and prior to resale or use by the importer.

Before appellant can bring this whisky into Kentucky, it must obtain a permit pursuant to KRS 243.680(2)(c); and, as a condition precedent to the issuance of the permit, it must pay a tax of 10c per proof gallon on the whiskey to be imported.

Since the case of Brown v. Maryland, 12 Wheat, 419, 25 U. S. 419, 6 L. Ed. 678, the United States Supreme Court has held that the above-quoted constitutional provision, known as the "import-export clause," protects goods imported for sale while they are in their original packages and have not been sold or used by the importer. "Use" by the importer of such goods does not include their storage preparatory to sale. Storage does not cause the goods to lose their character as imports. This is true even if the goods, such as the liquor in the case at bar, will only be sold for delivery in Kentucky. See State v. Board of Review, City of Milwaukee, et al., 15 Wis. 2d 330, 112 N. W. 2d 914.

Even though the tax is denominated as something else, such as an occupational tax (Brown v. Maryland, supra), an excise tax (Richfield Oil Corporation v. State Board of Equalization, 329 U. S. 69, 91 L. Ed. 80), or an ad valorem tax (Hooven & Allison v. Evatt, 324 U. S. 652, 89 L. Ed. (1252), if, in fact, it is a tax on imports, as that term is interpreted by the Supreme Court of the United States, the levy is invalid. The tax in the case at bar is an occupational or license tax in form, but appellant maintains it is nevertheless a tax on imports in fact.

Appellee argues that the Twenty-first Amendment to the Constitution of the United States has changed the rule regarding a state's right to tax imports. Section 2 of this amendment reads: "The transportation or importation into any state or territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." This point has been dealt with by courts of other jurisdictions.

In the case of Parrot & Co. v. San Francisco, Calif., 280 Pac. 2d 881, the City of San Francisco levied and collected an ad valorem property tax on some imported liquor which was still in its original unbroken packages, was stored in separate lots in warehouses and was undisposed of by the original importer by consignment or sale. That court held the second section of the

amendment did not repeal the import-export clause of the Constitution of the United States insofar as intoxicating liquors are concerned. The opinion states:

> "• • • The two sections (of the amendment), in their application to foreign imported liquor, are quite clearly complementary. The import-export clause permits the federal government exclusively to regulate and tax all imports from foreign lands, including liquors, as long as they remain imports, but when the importation is completed and the liquor is being transported or imported into one of the states 'for delivery or use therein' the power of the state attaches. The obvious purpose of the 21st amendment was to preserve the intra-state jurisdiction of the states so as to grant constitutional protection to those states desiring to remain or to become 'dry.'"

That court concluded such imported liquor was not subject to the city's ad valorem tax. A similar ruling was handed down by the Supreme Court of Wisconsin in State v. Board of Review, City of Milwaukee, supra, where the City of Milwaukee undertook to assess for the purpose of city taxation certain wines and liquors imported directly from various foreign countries. That court held that the assessment on the wines and liquors still in the original packages, unconsigned and unsold, violated the import-export clause and was therefore void.

Appellee contends it has authority to impose the tax under the Webb-Kenyon Act. See U. S. C. A., Title 27, Chapter 6. We do not agree. The two sections of this Act bestow upon the several states the power either to prohibit the transportation of any and all liquors into a state, if that particular state happens to be "dry," or to regulate the traffic in liquors within a state, if that particular state is "wet." Clearly this Act does not by its language confer upon a state the right to tax liquors in contravention of the import-export clause of the federal Constitution; furthermore, it was not the purpose of this Act to accomplish that purpose. The case of Carter v. Virginia, 321 U. S. 131, 88 L. Ed. 605, relied upon by appellee to sustain its right to levy the tax under consideration, simply does not, in our view, uphold

any such right or imply in any wise that the import-export clause of the Constitution of the United States may be ignored where the taxation of direct imports of foreign origin is involved.

It cannot be said the tax in question is an inspection measure, as appellee seems to suggest. Neither KRS 243.680(2), nor the regulation implementing this statute, provides for actual inspection of the imported whiskey. Actual inspection must be provided for in order that the statute may come under the exception noted in the import-export clause of the federal Constitution. See 29 Am. Jur., Inspection Laws, sec. 4, pp. 369-370. Kentucky makes no independent inspection of imported distilled spirits, but accepts the inspection made by the Alcohol & Tobacco Tax Division of the Bureau of Internal Revenue. See KRS 244.230.

In the final analysis, we conclude the language of KRS 243.680(2) makes it plain the incidence of the tax is the act of transporting or shipping the distilled spirits under consideration into this state. It is our opinon, under the facts presented and under the authority of the Wisconsin and the California cases, extensively referred to above, and the legal principles of both of which we adopt as the law of Kentucky, the whiskey is not subject to the tax collected under KRS 243.680(2). It follows that appellant is entitled to the relief sought, namely, a refund of the amount heretofore paid.

Wherefore, the judgment is reversed and remanded for further proceedings not inconsistent with this opinion.

ATTORNEY FOR APPELLANT:
Millard Cox
1021-1023 Ky. Home Life Bldg.
Louisville 2, Kentucky

ATTORNEYS FOR APPELLEE:
William S. Riley
Paul D. Ross
Hal O. Williams
Department of Revenue
Capitol Annex
Frankfort, Kentucky

ORDERS—KENTUCKY COURT OF APPEALS
WINTER TERM, MARCH 1, 1963

JAMES B. BEAM DISTILLING COMPANY ..... *Appellant*

VS.

APPEAL FROM A JUDGMENT OF THE FRANKLIN CIRCUIT COURT

DEPARTMENT OF REVENUE ..... *Appellee*

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for proceedings not inconsistent with the opinion herein, which is ordered to be certified to said Court.

It is further considered that the appellant recover of the appellee, its costs herein expended.

IN THE
SUPREME COURT OF THE UNITED STATES

No.———

DEPARTMENT OF REVENUE ----------PETITIONER

v.

JAMES B. BEAM DISTILLING COMPANY --------RESPONDENT

APPENDIX B

APPENDIX B

APPARENT CONSUMPTION OF DISTILLED SPIRITS BY CLASS AND TYPE

LICENSE STATES — **KENTUCKY MR-12**

Based on gallonage shipments to wholesalers — **DECEMBER 1960**

Wine Gallons

Class and Type	December 1960	December 1959	Jan.-Dec. 1960	Jan.-Dec. 1959	Percent Change Year to Date
DOMESTIC WHISKEY					
Bonded Bourbon	131,717	158,412	1,123,970	1,171,786	(- 4.1)
Bonded Rye	5	12	1,087	2,252	(- 53.8)
Straight Bourbon	95,952	94,897	927,152	856,904	8.2
Straight Rye	.....	22	173	264	(- 34.5)
Young Whiskey (under 2 years)	572	371	4,983	3,384	47.1
Blends of Straights	45	229	2,341	3,257	(- 28.5)
Blends of Neutral Spirits	21,439	14,087	224,980	201,736	11.5
Other	501	609	5,510	8,622	(- 36.1)
Total Domestic Whiskey	250,232	268,639	2,291,186	2,253,315	1.7
IMPORTED WHISKEY					
Scotch	14,276	11,777	111,373	101,853	9.3
Canadian	5,714	7,230	72,300	63,727	13.4
Irish	24	46	327	265	23.4
Other	.....	24	760	72	.....
Total Imported Whiskey	20,014	19,077	184,760	165,927	11.4
TOTAL ALL WHISKEY	270,246	287,716	2,475,946	2,419,242	2.3
GIN					
Domestic	18,012	14,411	276,877	278,255	(- 0.5)
Imported	881	420	7,678	6,488	18.3
TOTAL GIN	18,893	14,831	284,555	284,743	(- 0.1)
RUM					
Puerto Rican	2,786	2,274	17,924	15,985	12.1
Virgin Islands	74	36	165	70	135.7
Other Domestic	20	46	475	609	(- 22.0)
Total Domestic Rum	2,880	2,356	18,564	16,664	11.4
Imported Rum	.....	12	171	523	(- 67.3)
TOTAL RUM	2,880	2,368	18,735	17,187	9.0
BRANDY					
Domestic	967	1,169	11,099	9,130	21.6
Imported	598	442	5,717	4,857	17.7
TOTAL BRANDY	1,565	1,611	16,816	13,987	20.2
VODKA TOTAL	10,781	13,082	152,248	132,554	14.9
CORDIALS AND SPECIALTIES					
Domestic	2,292	5,256	33,586	31,181	7.7
Imported	727	449	3,182	2,996	6.2
TOTAL CORDIALS & SPECIALTIES	3,019	5,705	36,768	34,177	7.6
NOT ELSEWHERE SPECIFIED	278	287	2,543	2,425	4.9
TOTAL DOMESTIC DISTILLED SPIRITS	285,442	305,200	2,786,103	2,723,524	2.3
TOTAL IMPORTED DISTILLED SPIRITS	22,220	20,400	201,508	180,791	11.5
TOTAL ALL DISTILLED SPIRITS	307,662	325,600	2,987,611	2,904,315	2.9

Distilled Spirits Institute — 1132 Pennsylvania Building — Washington 4, D. C.

2/17/61

IN THE

SUPREME COURT OF THE UNITED STATES

No. 320

DEPARTMENT OF REVENUE, - - Petitioner,

vs.

JAMES B. BEAM DISTILLING COMPANY, Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Court of Appeals of Kentucky.

MILLARD COX,
1022 Kentucky Home Life Bldg.,
Louisville, Kentucky 40202
Counsel for Respondent.

WESTERFIELD-GOETZ CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

AUTHORITIES CITED.

IN THE

Supreme Court of the United States

No. 389

DEPARTMENT OF REVENUE, - - - *Petitioner,*

v.

JAMES B. BEAM DISTILLING COMPANY, - *Respondent.*

Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Court of Appeals of Kentucky.

QUESTION PRESENTED.

Respondent is not satisfied with Petitioner's statement of the question presented.

Simply stated, the sole question presented is whether, on the facts of this case, the following section of the Kentucky Revised Statutes contravenes the import-export clause (Article I, Sec. 10 Cl. 2) of the U. S. Constitution:

K.R.S. 243.680(2):

"(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state

without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

"(b) No railroad company or express company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

It is Respondent's contention, sustained by the Kentucky Court of Appeals, that the foregoing section of the Kentucky Revised Statutes contravenes Article I, Sec. 10 Cl. 2 of the U. S. Constitution as applied to imported liquors in the possession of the importer and still in original packages, prior to sale.

STATEMENT.

Counsel for Respondent is authorized by Counsel for Petitioner to state that the facts in the case *are not* in dispute. This is by way of correcting the error in the phrase in the Petition for Certiorari appearing at the beginning of the second literal paragraph at the top of page 5, and reading: "The facts under dispute may be found etc." Subsequent paragraphs, however, make it clear that the facts *are not* in dispute.

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT.

1. In this case the Kentucky Court of Appeals, in a unanimous opinion written by Chief Justice Stewart, has held against the Petitioner and denied its petition for a rehearing (367 S. W. 2d 267, May 24, 1963).

2. The United States Supreme Court in the case of Low v. Austin, 13 Wall. 29, decided the precise question at issue in 1871, the decision being in accord with that of the Kentucky Court.

3. The Low case (*supra*) was, of course, decided long before the passage of the Twenty-First Amendment (1933), but the passage of that amendment has not had the effect of repealing pro tanto the import-export clause of the U. S. Constitution.

On this subject we find the following general statement of the law in 30 American Jurisprudence 554-555:

> "While as a general rule the regulation of interstate and foreign commerce is a matter exclusively of federal regulation, the federal government has, by the Twenty-First Amendment, yielded some of its powers with reference to intoxicating liquors. The Twenty-First Amendment circumscribes the power of Congress by prohibiting the transportation or importation of intoxicating liquors into any state or territory for delivery or use in violation of the local law, but it does not deprive Congress of authority to control the importation of liquors into the United States. Moreover, Congress possesses the power to levy import duties on intoxicating liquors imported in foreign trade or commerce, and the several states,

> without the consent of Congress, are forbidden to lay duties on imports other than such as may be necessary for executing their inspection laws."

The foregoing rule has been applied uniformly by the highest courts of California, Wisconsin and Kentucky and, very recently, by a three Judge Federal Court in the Southern District of New York.

The California cases were Parrot v. San Francisco, 280 Pac. 2d 881, and National Distillers Products Corp. v. San Francisco, 297 Pac. 2d 61. *In the latter case certiorari was denied* (352 U. S. 928, 1 L. Ed. 2d 163).

The Wisconsin case was State Board of Review v. Milwaukee, 15 Wis. 2d 330, 112 N. W. 2d 914 (Jan. 9, 1962)

The U. S. three Judge District Court case was Idlewild Bon-Voyage Liquor Corp. v. Martin C. Epstein, *et al.* (December 27, 1962), 212 Fed. Supp. 376.*

The Kentucky case is the case at bar.

When this case was before the Kentucky court, Petitioner placed its sole reliance on the case of Carter v. Virginia, 321 U. S. 131, 88 L. Ed. 605.

The Kentucky court disposed of Petitioner's contention as follows:

> "The case of Carter v. Virginia, 321 U. S. 131, 88 L. Ed. 605, relied upon by appellee to sustain its right to levy the tax under consideration simply does not, in our view, uphold any such right or imply in any wise that the import-export clause of

*This case dealt with exports under the Import-Export clause but the reasoning applies with equal force to imports.

the Constitution of the United States may be ignored where the taxation of direct imports of foreign origin is involved."

The U. S. Judges in the Idlewild case (*supra*) dealt similarly with the Carter case and the Gordon case now relied on by Petitioner, finding that these cases had no application to the legal question at issue.

CONCLUSION.

For the reasons stated above, certiorari should be denied.

Respectfully submitted,

MILLARD COX,
1022 Kentucky Home Life Bldg.,
Louisville, Kentucky 40202
Counsel for Respondent.

I hereby certify that on this 27th day of August, 1963, a copy of this Brief in response to Petitioner's petition for writ of certiorari was mailed to each counsel for Petitioner.

Millard Cox

Supreme Court of the United States

OCTOBER TERM, 1963

No. 389

DEPARTMENT OF REVENUE ----------PETITIONER

AGAINST

JAMES B. BEAM DISTILLING COMPANY --------RESPONDENT

On Writ of Certiorari to the
Court of Appeals of Kentucky

BRIEF FOR PETITIONER, DEPARTMENT OF REVENUE

JOHN B. BRECKINRIDGE
ATTORNEY GENERAL OF THE
COMMONWEALTH OF KENTUCKY

WILLIAM S. RILEY
ASSISTANT ATTORNEY GENERAL,
DEPARTMENT OF REVENUE

ATTORNEYS FOR PETITIONER

FRANCIS D. BURKE
ATTORNEY

PAUL D. ROSS
ATTORNEY

HAL O. WILLIAMS
ATTORNEY

OF COUNSEL.

INDEX

CASES

CONSTITUTION, STATUTES & REGULATIONS

In the

Supreme Court of the United States

October Term, 1963

No. 389

DEPARTMENT OF REVENUE ---------- *Petitioner*

v.

JAMES B. BEAM DISTILLING COMPANY ---------- *Respondent*

BRIEF FOR PETITIONER

May It Please The Court:

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky was delivered on March 1, 1963. (R. pp. 36-40). Petition for Rehearing was overruled by the Court on May 24, 1963. (R. p. 41). The opinion is reported as James B. Beam Distilling Company v. Department of Revenue, Ky., 367 S.W. 2d 267.

JURISDICTION

Jurisdiction is vested in this Court pursuant to the provisions of Title 28, U.S.C.A., Sec. 1257 (3). The opinion attacked here was delivered March 1, 1963 (R. pp. 36-40). Petitioner's petition for rehearing was overruled May 24, 1963 (R. p. 41). Petitioner filed its petition for writ of certiorari to the Court of Appeals of Kentucky with this Court on August 20, 1963. The writ was granted on October 14, 1963 (R. p. 42). 11 L. ed. 2d 48.

The decision of the Kentucky Court of Appeals has stricken down the taxing and police power of the Commonwealth of Kentucky with regard to intoxicating beverages brought within its territorial jurisdiction by the respondent. This result was reached upon the theory that as to whiskey imported from without the country, Article I, Section 10, Clause 2 of the United States Constitution, commonly called the Export-Import Clause, destroys the state's undoubted power to tax and regulate whiskey brought into its borders from sister states. Grave results to the domestic industry would be threatened if the opinion of the Court of Appeals of Kentucky were correct and, at the least, Kentucky's alcoholic beverage control and taxing statutes would have to be revised if the opinion below stands.

The importance of this question on the interplay of federal and state power with regard to alcoholic beverages provides the basis for the Court's grant of certiorari and compelling reasons exist for the reversal of the opinion of the Court of Appeals of Kentucky.

STATUTES AND REGULATIONS INVOLVED

Art. I, Sec. 10, Cl. 2, of the United States Constitution:

> "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

The Twenty-first Amendment, Constitution of the United States:

> "Sec. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

27 U.S.C.A., Sec. 121:

"All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

27 U.S.C.A., Sec. 122:

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

KRS 243.680 (1):

"No person shall manufacture distilled spirits in this state unless he first obtains from the department

a permit to engage in the business of manufacturing distilled spirits. At the time of the issuance of the permit he shall pay to the state a tax of ten cents for each proof gallon of distilled spirits for which the permit is issued.

KRS 243.680 (2):

"(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

"(b) No railroad company or express company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

KRS 243.990 (6):

"Any person who fails to pay the taxes imposed by KRS 243.680 to 243.700 within fifteen days after they have become due, shall pay a penalty of twenty percent on the amount of the tax due."

Regulation PN-13:

"No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining an import permit, Revenue Form 548, either tax-paid or tax-free, from the Department of Revenue showing that payment of required taxes has been made.

"No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits unless a copy of the import permit, Revenue Form 548, which has been attested by an official of the Department

of Revenue, accompanies the shipment of distilled spirits into the state and is delivered to the consignee with the shipment.

"No Kentucky licensee shall receive on his premises any shipment of distilled spirits from any Kentucky licensed transporter, railway company, railway express company, boat line, air express company, or any other type of Kentucky licensed carrier, unless a copy of the import permit, Revenue Form 548, which has been attested by an official of the Department of Revenue, accompanies the shipment.

"More than one attested carrier's copy of an import permit may be issued by the Department of Revenue if request is included with application.

"Holders of import permits are required to return all carrier's copies to the Department of Revenue within 90 days from date of issuance. Permits not entirely used shall be returned to the department for credit. Failure to send in all carriers' copies of import permits within the 90-day period will necessitate withholding the issuance of additional import permits until all delinquent copies are returned to the department. If a permit is lost, satisfactory evidence shall be furnished the department in lieu of the permit."

QUESTION PRESENTED

The question presented for review may be stated quite simply as follows:

Where a state has imposed a license or occupational tax upon the business of distilling and manufacturing alcoholic beverages within the state, is it within the power of the state, consistent with Art. I, Sec. 10, Cl. 2, of the Constitution of the United States, to place an equal and like tax on the business of bringing distilled spirits into the state from a foreign country to be processed for sale to consumers?

STATEMENT

Respondent, James B. Beam Distilling Company, hereinafter referred to as the taxpayer, is engaged in the business of manufacturing, warehousing, bottling, importing, and selling distilled spirits products. It owns and operates plants at Clermont and Beam in Bullitt and Nelson Counties, Kentucky. (R. p. 5)

During the year 1959, the taxpayer entered into an agreement with W. A. Gilbey Limited of London, England, under the terms of which the taxpayer was granted the right to buy from Gilbey for importation, sale, and distribution in the United States a Gilbey product known as "Gilbey's Spey Royal Scotch Whiskey." (R. p. 5)

Between the dates of September 1, 1959, and April 1, 1960, the taxpayer acting under its agreement with Gilbey purchased and imported from Scotland into the United States and the Commonwealth of Kentucky 51,070.94 proof gallons of Gilbey's Spey Royal Scotch Whiskey. Some of the whiskey was in cases of twelve bottles each and some in the original casks. The bottled whiskey was ready for the consumer market. The whiskey casks had to be withdrawn from the bonded warehouse, the whiskey removed from the cask, reduced in proof to 86.8% by the addition of distilled water, and then bottled and cased. (R. pp. 17-21)

In accordance with the requirements of Kentucky Revised Statutes 243.680 (2), the taxpayer applied to and received from petitioner, Department of Revenue, hereinafter referred to as Department, permits authorizing the taxpayer to carry on its business by bringing into Kentucky from Scotland the quantity of Scotch whiskey shown on each permit. (R. pp. 9-16) The Department, at the time the permits were issued, collected from the taxpayer a license tax at the rate of ten cents per proof gallon for each proof gallon shown on the permit. Payment of

the tax at that time was discretionary as respondent could have deferred payment without penalty had it so elected. KRS 243.990 (6).

The Scotch whiskey was loaded on shipboard by the vendor at Glasgow, Scotland, and entered the United States at the ports of Chicago, Illinois, and New Orleans, Louisiana. The whiskey was then shipped by a common carrier to Louisville, Kentucky, where it was received by Robert Ice Truck Lines of Shepherdsville, Kentucky, and transported by truck belonging to said truck line from Louisville to Clermont, Kentucky, where it was received by the taxpayer into its Class 2 and 8 United States Customs Bonded warehouses. (R. p. 6)

The taxpayer filed a claim for refund of the tax, which claim the Department denied. The taxpayer then filed a Petition for Review before the Kentucky Tax Commission. (R. p. 4) By order No. 2,861 of the Commission, the Department's denial of the taxpayer's claim for refund was affirmed. (R. p. 26)

The taxpayer appealed to the Franklin Circuit Court. (R. p. 2) The case being submitted on the record made before the Kentucky Tax Commission, the Order of the Kentucky Tax Commission was upheld. The opinion and judgment of that Court correctly stated the law applicable to this controversy. (R. pp. 29-33). Taxpayer appealed the judgment of the Franklin Circuit Court to the Kentucky Court of Appeals. That Court delivered its opinion reversing the judgment of the Franklin Circuit Court. (R. pp. 36-40).

ARGUMENT

I. BROWN V. MARYLAND HAS NO APPLICATION TO THIS CASE.

The case of Brown v. Maryland, 25 U.S. 419, 6 L. ed 678 (1827), construed the Import-Export Clause of the Federal Con-

stitution as prohibiting the State of Maryland from imposing a direct tax on property imported into its boundaries. That case involved a tax on wines and distilled spirits, but the opinion dealt with imported properties generally. Since its enunciation, Brown v. Maryland, supra, has stood as the landmark opinion on all questions on the power of a state to tax articles imported from without the country.

That opinion has, however, never been asserted as prohibiting any tax other than a *direct tax* on property brought within the country.

This Court has said that the Import-Export Clause of the United States Constitution has no application to the process of importation after goods are unloaded at the water's edge. In Canton Railroad Co. v. Rogan, 340 U.S. 511, 95 L.ed 488 (1951), the State of Maryland imposed a franchise tax measured by gross receipts apportioned to the length of lines within the state. Canton Railroad Co. challenged the tax under the Import-Export Clause insofar as the gross income from which the tax was measured included revenues derived from the handling of goods moving in foreign trade. Canton was a common carrier of freight operating entirely within the city of Baltimore, Maryland. Its operating revenues were derived from switching freight cars from the piers to the lines of connecting railroads, from storage charges, and from wharfage fees for the privilege of using Canton's piers to transfer to lighters and trucks, the weighing of loaded freight cars, and furnishing of a crane for use in unloading vessels.

A substantial portion of the freight moving to and from the port consisted of exports from and imports into the United States. This Court, in holding that the inclusion of the railroad's receipts for services in handling imports and exports at its marine terminal did not violate the Import-Export Clause, stated that the tax was not on the articles of import and export.

This Court went on to say that the cases of A. G. Spaulding & Bros. v. Edwards, 262 U.S. 66, 67 L.ed 865, 43 S.Ct. 485 (1923), and Richfield Oil Corporation v. State Board of Equalization, 329 U.S. 69, 91 L.ed. 80, 67 S. Ct. 156, (1946), cited by Canton, relative to when the export process starts, had no application since the Maryland tax was not on the goods but on the *handling* of the *goods* at the port.

This Court made this very significant statement:

> "To export means to carry or send abroad; to import means to bring into the country. Those acts begin and end at water's edge. The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined. For if the handling of the goods at the port were part of the export process, so would hauling them to or from distant points or perhaps mining them or manufacturing them. The phase of the process would make no difference so long as the goods were in fact committed to export or had arrived as imports.
>
> "Appellant claims that loading and unloading are a part of its activities. But close examination of the record indicates that it merely rents a crane for loading and unloading and does not itself do the stevedoring work. Hence we need not decide whether loading for export and unloading for import are immune from tax by reason of the Import-Export Clause. Cf. Joseph v. Carter & Weekes Stevedoring Co. 330 US 422, 91 L ed 993, 67 S Ct 815.
>
> "We do conclude, however, that any activity more remote than that does not commence the movement of the commodities abroad nor end their arrival and therefore is not a part of the export or import process."

In the companion case of Western Maryland Railway Company v. Rogan, 340 U.S. 520, 95 L. ed 501 (1951), this Court

expanded its analysis of the question in Canton Railroad Co. v. Rogan, supra, by saying:

> "What we have said in Canton R. Co. v. Rogan (US) supra, is dispositive of this case. The present facts illustrate how wide a zone of tax immunity would be created if the contrary holding were made in the Canton R. Co. case. There we were dealing with the handling of exports and imports within a port. Here we have transportation of exports and imports to and from the port. If Maryland were required to grant tax immunity to the services involved in getting the exports to the port and the imports to their destination, so would any other State. The ultimate impact of such a holding is difficult to measure, since manifold services are involved in the movement of exports and imports within the country. Problems of this nature, like many problems in the law, involve the drawing of lines. So far as taxes on activities connected with bringing exports to or imports from the ship are concerned, we think the line must be drawn at the water's edge. Whether loading and unloading would be exempt is a question we reserve."

As recently as October, 1963, this Court has indicated that it regards the question as settled by a refusal of certiorari, Southcoast Fisheries, Inc. v. Department of Fish & Game, 28 Cal. Rep. 537; Certiorari Denied, 11 L. ed 2d 122.

Prior to its decision in the instant case, the Kentucky Court of Appeals had consistently construed the provisions of KRS 243.680 (1), (2), as not being a tax directly upon the spirits but as being a license tax upon the business of manufacturing, distilling, and rectifying intoxicating beverages. In Brown-Forman Company v. Commonwealth, 125 Ky. 402, 101 S.W. 321 (1907), that Court said:

> ". . . The tax is not upon the spirits. It is a license tax upon the business. To hold it a tax upon the property,

we must disregard the word 'license' in both the title and the body of the act. . . ."

On appeal of that case, this Court approved such construction, Brown-Forman Company v. Commonwealth of Kentucky, 217 U.S. 563, 54 L.ed 883 (1910).

Not only has the Court of Appeals previously so construed the questioned taxing statute but in its opinion below its concluded that the tax was not upon the distilled spirits but upon ". . . the act of transporting or shipping the distilled spirits under consideration into this State. . . ."

The Court rested its opinion, in part, on the opinion of this Court in Richfield Oil Corporation v. State Board of Equalization, 329 U.S. 69, 91 L.ed 89 (1946). In that case, a single isolated sale of oil to a foreign buyer was held to be exempt from a state sales tax as violative of the Import-Export Clause. The business of selling or producing oil was not being taxed. In the case at bar, the business of rectifying, distilling, blending, and selling intoxicating beverages is involved. The statute judged to be violative of the Import-Export Clause has been on the books of the statutory law of Kentucky for more than half a century. During that time, it has been approved as an excise tax on such business.

It is, therefore, submitted that Richfield Oil Corporation v. State Board of Equalization affords no basis for the opinion of the Court of Appeals of Kentucky. If, however, the opinion of Richfield Oil Corporation v. State Board of Equalization should appear to be dispositive of the issue, it is submitted that that opinion cannot be harmonized with the expressions of this Court in Canton Railroad Company v. Rogan, supra, and Western Maryland Railway Company v. Rogan, supra. If in conflict, the views in the two later cases stand on better reasoning and Richfield Oil Corporation v. State Board of Equalization should be expressly overruled.

Even if the taxes imposed by KRS 243.680 (1), (2), are regarded as taxes directly upon the spirits, the petitioner is empowered to levy the questioned taxes. Imported property loses its immunity from taxation when it is so used by its owner as to irrevocably commit it to a process of manufacture. The Scotch whiskey involved here was brought to the business premises of the respondent in Clermont, Kentucky, and stored in Customs Bonded warehouses where it was removed into the bottling house of respondent so that it could be reduced in proof by the addition of distilled water, bottled, labeled, and cased in conformity with applicable United States, Federal, and State laws and regulations. At this point, the whiskey was then ready for sale on order into the consumer market of the United States. (Affidavit of Mrs. Ruth B. Carey, R. p. 21, par. 14). Youngstown Sheet & Tube Company v. Bowers and United States Plywood Corporation v. City of Algoma, 358 U.S. 534, 79 S.Ct. 383, 3 L.ed. 2d 490 (1959).

II. ASSUMING ARGUENDO THAT THIS TAX IS A DIRECT TAX ON THE IMPORTATION OF DISTILLED SPIRITS INTO KENTUCKY, CONGRESS HAS GIVEN ITS CONSENT TO THE LEVYING OF SUCH A TAX.

As early as 1890, Congress gave consent to the states to the taxation of intoxicating liquors imported from foreign countries in the original package to the same extent as liquor produced in such states, 27 U.S.C.A. 121; 27 U.S.C.A. 122. These sections were passed under the authority of the Import-Export Clause which permits Congress to consent to the laying of imposts and duties on imports by the states. Thus, distilled spirits more than 73 years ago were declared by Congress to be a unique type of property and one which the states should have the authority to control.

So obvious is this fact, that this Court approved the state's right to impose conditions on the entry of distilled spirits from

foreign countries in a two-column memorandum opinion fifty years ago. DeBary & Co. v. State of Louisiana, 227 U.S. 108, 57 L. ed. 441 (1913).

III. THE TWENTY-FIRST AMENDMENT TO THE FEDERAL CONSTITUTION HAS DEFINITELY SETTLED THE QUESTION OF THE STATE'S RIGHT TO CONTROL THE IMPORTATION OF ALCOHOLIC BEVERAGES INTO AND THROUGH ITS BORDERS.

Acting in accordance with the principle that this Court will not pass on questions of constitutionality unless such action is unavoidable, this Court has never passed upon the grave constitutional issue of whether the broad sweep of powers accorded the states by the Twenty-first Amendment renders state laws taxing and regulating alcoholic beverages superior to conflicting federal laws. This Court has, however, while refusing to confront that issue, consistently stressed the broad state power with regard to intoxicating beverages. United States vs. Frankfort Distilleries, Inc. 324 U.S. 293, 65 S. Ct. 661, 89 L. Ed. 951 (1945); Nippert v. City of Richmond 327 U.S. 416, 66 S. Ct. 586, 90 L. ed. 760 (1946); Carter v. Virginia 321 U.S. 131, 64 S. Ct. 464, 88 L. ed. 605 (1944).

The reasoning of Justice Frankfurter in Carter v. Virginia, supra, is pertinent here. On pages 613 and 614 of 88 L. ed. it is said:

> ". . . The Twenty-first Amendment prohibits the 'transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof,' not when the liquor is for delivery *and* use but for 'delivery *or* use therein.' In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore subject to control by that State. . . .

". . . In a word, having the power to prohibit liquor from coming into a State, a State may take measures against frustration of that power by resort to the claim that liquor passing through a State enjoys the protection of the Commerce Clause. If a State may take these protective measures, as surely it may, who is to decide what measures are necessary for its protection? If a State may ask for the posting of a $1,000 bond, may she not require a $10,000 bond? If a State should urge that its experience shows that any regulatory system is ineffective because illicit diversion is too resourceful for control by mere regulation and requires prohibition, who is to say, in view of the history embedded in the Twenty-first Amendment, that a State may not fairly act on such a judgment? Are not these peculiarly political, that is legislative, questions which were not meant by the Twenty-first Amendment to continue to be the fruitful apple of judicial discord, as they were before the Twenty-first Amendment?

"6. It is now suggested that a State must keep within 'the limits of reasonable necessity' and that this Court must judge whether or not Virginia has adopted 'regulations reasonably necessary to enforce its local liquor laws.' Such canons of adjudication open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which led first to the Eighteenth and then to the Twenty-first Amendment.

"7. Less than six years ago this Court rejected the impossible task of deciding, instead of leaving it for legislatures to decide, what constitutes a 'reasonable regulation' of the liquor traffic. The issue was fairly presented in Mahoney v. Triner Corp., 304 US 401, 82 L. Ed. 1424, 58 S. Ct. 952. And this was the holding:

" 'We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so

would, as stated in the Young's Market Co.'s Case (299 US 59) p 62, 81 L. Ed. 38, 40, 57 S. Ct. 77, "involve not a construction of the Amendment, but a rewriting of it." 304 US 404, 82 L. Ed. 1427, 58 S. Ct. 952.

"Therefore if a State, in aid of its powers of prohibition, may regulate, without let or hindrance by courts regarding the 'reasonableness' of a regulation, it may do so whether the liquor is openly consigned for consumption within it or intended for consumption there although, by subterfuge too difficult to check, nominally destined elsewhere.

". . . And since Virginia derives the power to legislate as she did from the Twenty-first Amendment, the Commerce Clause does not come into play. . . ."

It is true the Carter case did not deal with distilled spirits imported from a foreign country, but in the case of Gordon v. Texas, 310 S.W. 2d 328 (1958), the court was confronted with the question of the power of Texas to tax the importation into Texas of rum from the Republic of Mexico which was not even sold or consumed in the State of Texas but merely transported to the owner's home in North Carolina.

The Texas Court had little difficulty in sustaining the power of the State to impose a nondiscriminatory tax on whiskey brought into its borders from a foreign country.

This Court affirmed that expression of opinion per curiam citing the case of Carter vs. Virginia, supra, and the Twenty-first Amendment. Gordon v. Texas, 355 U.S. 369, 2 L. ed. 2d 352, 78 S. Ct. 363 (1958).

The state's police power to control the movement of distilled spirits was restored under the Twenty-first Amendment as exemplified in the case of Ziffrin v. Reeves, 308 U.S. 132, 84 L. ed. 128, 60 S. Ct. 163 (1939). There the Court considered the entire matter of Kentucky's power over the shipment of distilled

spirits into its borders. The Commonwealth of Kentucky had provided that any distilled spirits entering the state that did not follow designated routes of entry and passage would be considered contraband. This Court is sustaining the power to so control such spirits, at page 135 of the Lawyers Edition:

> "... Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. ..."

The most recent expression of opinion defining a state's power with regard to intoxicating beverages brought within its territorial limits is that of American Travelers Club, Inc. v. Hostetter, etc., 219 F. Supp. 95 (1963) (U.S.D.C. S.D. New York). In that case a three judge court, speaking through Justice Medina, upheld the New York Alcoholic Beverage Control Law in its entirety as applied to alcoholic beverages brought into the State of New York by travelers returning from foreign countries. While not dealing expressly with the Export-Import Clause, Justice Medina concluded:

> "Whether one takes the position that the Twenty-first Amendment frees the states entirely from the ambit of the Commerce, Due Process and Equal Protection Clause, or whether one takes the view that reasonable regulation of liquor traffic by a state constitute a proper exercise of the police power, it is abundantly clear that New York has not violated any of the constitutional provisions relied upon by plaintiff. ..."

The Kentucky statutes impose a tax on the business of manufacturing distilled spirits within the state. Its power to do so is not challenged. Complementary to that lawful exercise of power it has imposed a like and equal tax upon whiskey brought into the state, KRS 243.680 (1) (2).

Under the Twenty-first Amendment, the state's power with regard to alcoholic beverages may be exercised without regard to the origin of intoxicating beverages introduced into its territorial limits. That being true, the opinion of the Court of Appeals of Kentucky must be reversed.

CONCLUSION

For the reason and on the authorities set forth herein, it is submitted that the opinion of the Court of Appeals of Kentucky is erroneous.

The opinion of the Court of Appeals of Kentucky should be reversed together with directions to it to reinstate the judgment of the Franklin Circuit Court denying respondent the relief sought and adjudging that respondent is not entitled to a refund of the taxes paid.

Respectfully submitted,
JOHN B. BRECKINRIDGE
Attorney General
Commonwealth of Kentucky

WILLIAM S. RILEY
Assistant Attorney General
Department of Revenue
Commonwealth of Kentucky

FRANCIS D. BURKE
Attorney
Department of Revenue

PAUL D. ROSS
Attorney
Department of Revenue

HAL O. WILLIAMS
Attorney
Department of Revenue

By William S. Riley
William S. Riley
Assistant Attorney General
Department of Revenue
Commonwealth of Kentucky
ATTORNEYS FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 335

DEPARTMENT OF REVENUE, - - Petitioner,

vs.

JAMES B. BEAM DISTILLING COMPANY, Respondent.

BRIEF FOR RESPONDENT.

MILLARD COX,
1021-1023 Ky. Home Life Bldg.,
Louisville 2, Kentucky,
Counsel for Respondent.

WERTHEIM-GRAVE CO., INCORPORATED, LOUISVILLE, KY.

INDEX, POINTS AND AUTHORITIES.

AUTHORITIES CITED.

IN THE

Supreme Court of the United States

October Term 1963

No. 389

DEPARTMENT OF REVENUE, - - - *Petitioner,*

v.

JAMES B. BEAM DISTILLING COMPANY, - *Respondent.*

BRIEF FOR RESPONDENT.

QUESTION PRESENTED.

Respondent is not satisfied with Petitioner's statement of the question presented.

The sole question presented is whether, on the facts of this case, the following section of the Kentucky Revised Statutes contravenes the import-export clause (Article I, Sec. 10 Cl. 2) of the U. S. Constitution:

K.R.S. 243.680 (2):

> "(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.
>
> "(b) No railroad company or express company shall receive for shipment or ship into this

state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

It is Respondent's contention, sustained by the Kentucky Court of Appeals (R., pp. 36-40), that the foregoing section of the Kentucky Revised Statutes contravenes Article I, Sec. 10 Cl. 2 of the U. S. Constitution as applied to imported liquors in the possession of the importer and still in original packages, prior to sale or use by the importer.

STATEMENT.

We find two objections to the statement of the case in Petitioner's brief (pp. 6-7). They are these:

1. While the statement is adequate as far as it goes, it fails to make clear that "the tax was collected while the whiskey remained in unbroken packages in the hands of the original importer and prior to resale or use by the importer" (see Court of Appeals' Opinion, R. p. 37).

2. Petitioner's Statement is in error in asserting that "Payment of the tax at the time was discretionary as Respondent could have deferred payment without penalty had it so elected."

All importers under the Kentucky Statute and Regulations must obtain import permits prior to bring-

ing distilled spirits into Kentucky and must pay the tax at the rate of ten cents per proof gallon before the permit will be issued by the Department of Revenue.

For the foregoing reasons, we ask the Court to accept as our statement of the case, the facts set forth in the Opinion of the Kentucky Court of Appeals (R., pp. 36-37).

This statement of the case by the Court of Appeals has never been questioned by Petitioner. It is concise, contains all of the essential facts, and is free from extraneous matters.

ARGUMENT.

PART I.

Meaning of "Import".

In order to receive the constitutional immunity from state taxation, imported articles must withstand the following tests at the time they are sought to be taxed.

1. The article must have been "brought into the country from a place without it", *i. e.*, from some place which has not "been united governmentally with the United States by and under the Constitution". Hoover & Allison Co. v. Evatt (1944), 324 U. S. 652, 89 L. Ed. 1252, 1267, 1268. Hence goods transported from one state to another are not imports since they are articles originating in the United States and not brought into it. (*Idem*, p. 1265).

2. The article must still be in the original package in which it was brought into this country. Brown v. Maryland (1827), 12 Wheat U. S. 419, 6 L. Ed. 678.

3. The article must still be in the hands of the original importer, Brown v. Maryland (*supra*), prior to any re-sale (*Idem*); and if brought in by the importer for his own use, prior to any such use by him. Youngstown Sheet & Tube Co. v. Bowers (1959), 358 U. S. 354, 3 L. Ed. 2d 490.

The Scotch whiskey imported by Respondent (hereinafter referred to as the Taxpayer) in the case at bar meets all of the foregoing tests as shown by the record before the Department of Revenue and the Kentucky Tax Commission (R., pp. 5-21). The facts as set forth in Taxpayer's application for refund and the affidavit supplied by its Custom House Broker are undisputed (R., pp. 5-7).

It is not disputed that the tax was collected while the imports remained in unbroken packages in the hands of the original importer and prior to re-sale or use by him.

The case of Brown v. Maryland (*supra*) decided by this Court in 1827 (opinion by Chief Justice Marshall), was the first case to test the constitutionality of a state law imposing a tax on imports. In view of the fact that it established basic principles which have been adhered to ever since in an unbroken line of decisions, the case calls for close scrutiny and analysis.

In 1825 Maryland had enacted a law which laid a tax of $50.00 on all "importers", the language of the act being as follows:

"And be it enacted that all importers of foreign articles or commodities, of dry goods, wares or merchandise, by bale or by package, or of wine, rum brandy, whiskey and other distilled spirituous liquors etc. and other persons selling the same by wholesale, bale, or package, hogshead barrel or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement."

The question at issue was posed by Chief Justice Marshall as follows:

"The cause depends entirely on the question whether the legislature of a state can constitutionally require the importer of foreign goods to take out a license from the state before he shall be permitted to sell a bale or package so imported."

The Chief Justice then directed himself to the words of Article I Sec. 10 Cl. 2 of the Constitution, which prohibits a state from laying "any imposts or duties on imports or exports", and made this inquiry:

"What then is the meaning of the words 'imposts or duties on imports or exports'?"

He answered his own question thus:

"An impost or duty on imports is a custom or tax levied on articles brought into a country and

is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in his custody. It would not however, be less an impost or duty on the articles, if it were to be levied on them after they had landed."

Recognizing that an "import" must necessarily cease to be such at some time and become thereafter subject to state taxation, the Chief Justice went on to observe:

> "When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the constitution."

Ever since the first Revenue Act in 1789, the United States had been collecting customs duties on imports as one of its principal sources of revenue.

In evident note of this fact Justice Marshall said:

> "By payment of import duties to the United States, the importer purchases the right to dispose of his merchandise as well as to bring it into the country."

It was argued by the Attorney General of Maryland that the Maryland tax was not a tax on the imported article itself but a tax only on the occupation of importer. This is the same argument now being made by Counsel for Petitioner.

This contention was answered as follows:

> "It is argued that this is not a tax on the article, but on the person. The state, it is said, may tax occupations and this is nothing more.
>
> "It is impossible to conceal from ourselves that this is varying the form without varying the substance. * * * So, a tax on the occupation of an importer is in like manner a tax on importation. It must add to the price of the article and be paid by the consumer, or by the importer himself in like manner as a direct duty on the article itself. This a state has not the right to do because it is prohibited by the Constitution."

ARGUMENT (Continued)

PART II.

A State May Not Lay *Any* Tax on "Imports" as That Term Is Interpreted by the U. S. Supreme Court.

In the first case to arise involving a state tax on imports (Brown v. Maryland), the tax was an occupational tax levied on an importer.

Since then this Court has struck down various other forms of state taxation whenever it has found the tax to be one levied on an "import" as originally interpreted by Chief Justice Marshall.

For example, in the case of Hooven & Allison v. Evatt, 324 U. S. 652, 89 L. Ed. 1252 (1944), the tax held unconstitutional was an ad valorem property tax levied on bales of hemp and other fibers imported from the Philippine Islands while the articles remained in their original packages and before being sold or put to the use for which they had been imported.

In Richfield Oil Corp. v. State Board of Equalization (1946), 329 U. S. 69, 91 L. Ed. 80, the invalidated tax was one which the Supreme Court of California had construed to be "an excise for the privilege of conducting a retail business measured by the gross receipts from sales".

By way of pointing out that it is the effect of the tax rather than what the tax is called or what form it takes, this Court speaking through Mr. Justice Douglas said:

> "That construction (the California Supreme Court's) is binding on us. But it is not determinative of the question whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax but its operation and effect."*

Low v. Austin, 13 Wall. 29 (1871), involved a California ad valorem tax on some cases of imported wines still in unbroken packages and in the hands of the original importer.

By the Court (Mr. Justice Field):

> "The simple question presented in this case for consideration is whether imported merchandise

*Annotations on this general question will be found in 89 L. Ed. 1279 and 95 L. Ed. 496.

upon which the duties and charges of the custom house have been paid, is subject to state taxation whilst remaining in the original cases, unbroken and unsold, in the hands of the importer.

"The decision of this Court in the case of Brown v. Maryland furnishes the answer to the question. * * *

"The question is not as to the extent of the tax or its equality with respect to taxes on other property, but as to the power of the state to levy any tax. * * * Imports whilst retaining their distinctive character as such must be treated as being without the jurisdiction of the taxing power of the state."

We have demonstrated that whether the state tax be an occupational tax, an excise or an ad valorem tax; and regardless of what it may be called, if, in fact, it is a tax on imports, as that term is interpreted by this Court, the levy is invalid.

ARGUMENT (Continued)

PART III.

The Passage of the Twenty-First Amendment Has Not Changed the Rule That Alcoholic Liquors Imported From Foreign Countries Are Immune From State Taxation so Long as They Retain the Status of "Imports".

In the case at bar we are dealing with alcoholic liquor. This fact raises the question as to whether imported alcoholic liquors, by reason of their nature, are to be treated any differently under the Import-Export Clause from other imported goods.

We have seen that this Court held in the case of Low v. Austin (*supra*) that imported wines were not subject to an ad valorem property tax while remaining in the original cases, unbroken and unsold, in the hands of the importer. This case was decided in 1871.

The case at bar presents a further inquiry which has not heretofore been passed on by this Court, viz.: Did the passage of the Twenty-First Amendment (1933) in any way change the rule laid down in Low v. Austin (*supra*)?

The Twenty-First Amendment reads:

> "§1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> "§2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

We confidently maintain that Sec. 2 of this Amendment has not had the effect of repealing pro tanto the Import-Export Clause of Article I of the Constitution and that imports of alcoholic liquors from foreign countries are still immune from state taxation providing they meet the test of "imports" as defined by this Court.*

A recent California case dealt with this question which is also the precise question at issue in the case at bar. Parrot & Co. v. San Francisco (1955), 280 Pac. 2d 881.

---

*Annotations dealing with decisions since the passage of the 21st Amendment will be found in 84 L. Ed. 37 and 88 L. Ed. 614.

The City of San Francisco levied and collected an ad valorem property tax on some imported liquor. As stated in the opinion: "Admittedly, the liquor was still in the original unbroken packages in which it had been imported. Admittedly this liquor was held by respondents in identifiable and segregated lots separate from their other merchandise store in the warehouses. Admittedly, on the first Monday of March 1952 (the assessment date), the liquor had not been disposed of by respondents by consignment or sale."

The levy was made after the city had demanded that the respondents list all personal property owned or controlled by them or in their possession on the assessment date. The imported liquor was separately listed and taxed separately from the other personal property of the taxpayers. The respondents paid that portion of the tax assessed against the imported liquor and instituted suit for refund on the ground that the liquor was exempt from state taxation under the Import-Export clause of the U. S. Constitution.

Both the lower Court and the California Supreme Court held the liquor in question to be exempt from state taxation.

The tax in this case was an ad valorem property tax, while the tax in the case at bar is an occupational or license tax. But as we have seen, the nature of the tax or by what name it is called is immaterial if in fact it is a tax on imports. Richfield Oil Corp. v. State Board of Equalization (*supra*).

In all other respects the Parrot case is on "all fours" with the case at bar and so we will quote fully

from the opinion, since its reasoning has been adopted as the law of Kentucky by the Kentucky Court of Appeals (see R., p. 40):

By the Court:

"The problem revolves around the proper interpretation of two sections of the Constitution of the United States.

"Article One, Section 10, of that Constitution contains an enumeration of those powers that are prohibited to the states. Paragraph 2 of the section reads as follows:

> 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.'

"The Twenty-First Amendment to the United States Constitution repealed the Eighteenth Amendment[1] and also provided in section 2: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violations of the laws thereof, is hereby prohibited.'

"The California Constitution, Article XIII, Section one, permits *ad valorem* taxation of 'All

[1]The Twenty-first Amendment became effective December 5, 1933

property in the State * * * not exempt under the laws of the United States'. (See also §§ 201 and 202, Rev. & Tax Code.)

"The question presented is whether intoxicating liquor, imported into the United States from a foreign country, while still in the hands of the importer, and while such liquor is still in its original packages, unconsigned and unsold, is property 'exempt' from taxation 'under the laws of the United States'? It is the theory of appellant that, although such liquors are imports to which the import-export clause would normally be applicable so as to prevent state taxation, such taxation is permitted because the Twenty-first Amendment removed intoxicating liquor from the constitutional protection of the import-export clause. In other words, it is urged that, under that amendment, intoxicating liquor has been made a special article of commerce, removed from the protection of the import-export clause, and that its control, including the power to tax it, has been granted exclusively to the states.

"The answer to the main question must be that foreign imported intoxicating liquor, while still in the hands of the importer and in its original packages, is an import which under the import-export clause, has been made immune to state taxation. In other words, the Twenty-first Amendment did not repeal the import-export clause insofar as intoxicating liquors are concerned.

"Before directly dealing with the proper interpretation of the Twenty-first Amendment some mention should be made of the general law interpreting the breadth and scope of the import-export clause. As early as 1827 Chief Justice Marshall,

speaking for the United States Supreme Court in the case of Brown v. State of Maryland, 12 Wheat. 419, 6 L. Ed. 678, enunciated the so-called 'original package' doctrine. Under that doctrine foreign imports, while still in their original packages and in the hands of the original importers, were held immune from state taxation. In 1871, in the case of Low v. Austin, 13 Wall. 29, 20 L. Ed. 517, the United States Supreme Court, in a case similar to those here under consideration, held that the 'original package' doctrine applied to foreign imported liquor so as to render such liquor free from state taxation. The 'original package' doctrine, as far as foreign imports are concerned, has been followed by the United States Supreme Court in a long line of cases. One of the most recent is Hooven & Allison Co. v. Evatt, 324 U. S. 652, 65 S. Ct. 870, 89 L. Ed. 1252, decided in 1945, and written by Chief Justice Stone. In that case the state attempted to levy an *ad valorem* tax on certain hemp imported by an Ohio manufacturer and held by him in the original packages preparatory for use in his Ohio factory. It was held that the import-export clause barred such taxation. After quoting the import-export clause the court stated, 324 U. S. at page 656, 65 S. Ct. at page 873:

'These provisions were intended to confer on the national government the exclusive power to tax importations of goods into the United States. That the constitutional prohibition necessarily extends to state taxation of things imported, after their arrival here and so long as they remain imports, sufficiently appears from the language of the constitutional provision itself and its exposition by Chief Justice Marshall in

Brown v. Maryland, supra. We do not understand anyone to challenge that rule in this case.

'It is obvious that if the states were left free to tax things imported after they are introduced into the country and before they are devoted to the use for which they are imported, the purpose of the constitutional prohibition would be defeated. The fears of the framer, that importation could be subjected to the burden of unequal local taxation by the seaboard, at the expense of the interior states, would be realized, as effectively as though the states had been authorized to lay import duties."[2]

"After discussing and quoting from Brown v. State of Maryland, supra, the court continued, 324 U. S. at page 657, 65 S. Ct. at page 873:

'Although one Justice dissented in Brown v. Maryland, supra, from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported. [Citing many cases, including Low v. Austin, the liquor case cited *supra*.]'

"The court also discussed the difference between the power of the state to tax goods in the original packages when they are in interstate commerce and when they are foreign imports. In this connection the court stated, 324 U. S. at page 665, 65 S. Ct. at page 877:

---

[2]See Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.).

'In the one case [foreign imports] the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other [interstate commerce] the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not.'

"Appellant does not challenge the well-settled rules of law above set forth, and concedes that, were it not for the Twenty-first Amendment, the City would be powerless to tax the liquor here involved. But it is asserted that that amendment removed intoxicating liquor from the protection of the import-export clause.

"In considering this argument there are certain general observations that should be made. The Twenty-first Amendment contains no mention of taxation at all, and certainly does not provide, expressly, for the repeal of any portion of Article 1, Section 10, of the Constitution. If a *pro tanto* repeal took place it occurred by implication based on the theory that in their application to foreign imported liquor the two sections are inconsistent. Not only are repeals by implication not favored in the law, and will not be found to exist unless the two provisions are wholly irreconcilable (see discussion 11 Cal. Jur. 2d p. 351, § 39), but here, if the two provisions are laid side by side it will be discovered that no word or phrase of one is inconsistent with the other. The two sections, in their application to foreign imported liquor, are quite clearly complementary. The import-export clause permits the federal government exclusively

to regulate and tax all imports from foreign lands, including liquors, as long as they remain imports, but when the importation is completed and the liquor is being transported or imported into one of the states 'for delivery or use therein' the power of the state attaches. The obvious purpose of the Twenty-first Amendment was to preserve the intrastate jurisdiction of the states so as to grant constitutional protection to those states desiring to remain or to become 'dry.' (See LV Yale Law Journal, p. 815.) That amendment raised to constitutional dignity the right of each state to control its own liquor traffic, but there is not the slightest reason to believe that it was intended to modify the traditional federal-state relationship in connection with foreign imported liquor. See State of Georgia v. Wenger, D. C., 94 F. Supp. 976, affirmed 187 F. 2d 285, certiorari denied 342 U. S. 822, 72 S. Ct. 41, 96 L. Ed. 621.

"Moreover, the practical effect of appellant's interpretation cannot be overlooked. If the coastal states could tax or prohibit the importation of foreign liquors, it could 'dry up' the interior states so far as such liquors are concerned. Moreover, a coastal state could, for example, tax Irish whiskey and not tax Scotch whiskey, and thus influence foreign commerce and the tariff structure of the nation adverse to the public interest. It was for these very reasons that the United States Constitution placed all powers relating to foreign intercourse exclusively in the hands of the federal government. See for a few classic cases so holding Holmes v. Jennison, 14 Pet., 540, 570, 10 L. Ed. 579; Board of Trustees of University of Illinois v. U. S., 289 U. S. 48, 56, 53 S. Ct. 509, 77 L. Ed.

1025; United States v. Belmont, 301 U. S. 324, 331, 57 S. Ct. 758, 81 L. Ed. 1134. It should also be mentioned that if the coastal states could tax imported liquor and keep the tax proceeds they would be enriching themselves at the expense of the nation. The import-export clause above-quoted expressly provides that the revenue from any such imposts shall be for the use of the United States treasury. Thus, appellant's contention necessarily includes the argument that the Twenty-first Amendment repealed, *pro tanto*, this clause, as well, an argument which has no basis at all.

"One other general comment can be made. Although the Twenty-first Amendment has been in effect for nearly twenty-two years, the appellant is unable to point to any decision in the entire United States holding that a state or its agencies has the power under the amendment to levy an *ad valorem* tax on foreign imported liquor, while it is still in its original package, unconsigned and unsold, nor has appellant referred us to any statute of any city, county or state that has ever before attempted to levy such a tax. Of course, this does not prove that such a tax cannot be levied, but in view of the keen interest of local taxing authorities in finding new sources of tax revenue, if the two provisions of the Constitution are so inconsistent that the amendment repealed, *pro tanto*, the import-export clause as contended by appellant, it is somewhat surprising to find that no enterprising tax assessor has heretofore noted such inconsistency.

"Appellant predicates the major portion of its argument on the case of State Board of Equalization of California v. Young's Market Co., 299 U.S.

59, 57 S. Ct. 77, 81 L. Ed. 38. That case involved the constitutionality of a California statute imposing a license fee on importers of foreign beer. In that case the plaintiffs were domestic corporations engaged in the business of selling at wholesale in California beer imported from Missouri and Wisconsin. The tax was attacked on the ground that it violated the commerce and equal protection clauses of the federal Constitution. The court held that the license fee was valid under the Twenty-first Amendment, and stated, 299 U.S. at page 62, 57 S. Ct. at page 78:

> 'Prior to the Twenty-First Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide. * * *'
>
> 'The amendment which "prohibited" the "transportation or importation" of intoxicating liquors into any state "in violation of the laws thereof," abrogated the right to import free, so far as concerns intoxicating liquors.'

"The court went on to explain that the Amendment confers the right on a state to prohibit all 'importations' if it so desires, and therefore, 299 U. S. at page 63, 57 S. Ct. at page 79, 'the state may adopt a lesser degree of regulation than total prohibition. * * * It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domes-

tic manufacture of beer and exclude all made without the state, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee?'

"This case has been followed in several cases all holding that intoxicating liquor imported from one state to another for delivery or use in the second state can be subjected under the Twenty-first Amendment to various discriminating practices not otherwise permitted by the commerce clause. See, for example, Mahoney v. Joseph Triner Corp., 304 U. S. 401, 58 S. Ct. 952, 82 L. Ed. 1424; Indianapolis Brewing Co. v. Liquor Control Commission, 305 U. S. 391, 59 S. Ct. 254, 83 L. Ed. 243; Finch & Co. v. McKittrick, 305 U. S. 395, 59 S. Ct. 256, 83 L. Ed. 246.

"There is no doubt some very general language in the Young case, and the cases following it, which, separated from the facts to which such language was intended to apply, seems to support appellant's argument. But all of these cases dealt with interstate commerce and not with foreign commerce. As was pointed out in Hooven & Allison Co. v. Evatt, 324 U. S. 652, 65 S. Ct. 870, 89 L. Ed. 1252, quoted from above, there is a vast difference between the commerce clause and the import-export clause. The commerce clause contains but a limited prohibition while the import-export clause is absolute. Moreover, in the Young case, it is apparent that the beer brought into California from Missouri and Wisconsin was brought in for the purpose of 'delivery or use' in California, so that the case fell directly within the express language of the Twenty-first Amendment. In the instant case the liquors are still imports, not only

in their original packages, but unconsigned or unsold so far as ultimate destination is concerned.

"Certainly the Young case does not stand for the proposition that any state can prohibit the transportation across it of liquor intended for another state. It has been expressly held that the Twenty-first Amendment does not apply to intoxicating liquor merely passing through a state and not imported 'for delivery or use' in such state. Collins v. Yosemite Park & Curry Co., 304 U. S. 518, 58 S. Ct. 1009, 82 L. Ed. 1502. In that case it was held that California had no power to tax liquor passing through the state to a National Park located within the state. See also Carter v. Commonwealth of Virginia, 321 U. S. 131, 64 S. Ct. 464, 88 L. Ed. 605; Motor Cargo v. Division of Tax Appeals, etc., 10 N. J. 580, 92 A. 2d 774. This rule of inability to tax liquor merely passing through the state applies both to foreign imported liquor and to liquor in interstate commerce. In Von Hamm-Young Co. v. City and County of San Francisco, 29 Cal. 2d 798, 178 P. 2d 745, 171 A.L.R. 224, the Supreme Court of California, in a thorough and well-reasoned opinion, held invalid a personal property *ad valorem* tax imposed on liquor stored in San Francisco warehouses, which liquor had been partially purchased outside California, partially inside California but outside San Francisco, and some inside San Francisco. All the liquor was intended for transportation to Hawaii. It was held that the state had no power, under the Twenty-first Amendment, to tax such liquor while it was in interstate commerce.

"While it is true that the 'original package' doctrine has been limited in interstate commerce

cases by the doctrine that state power attaches when the goods have 'come to rest' in a state, Minnesota v. Blasius, 290 U. S. 1, 54 S. Ct. 34, 38, 78 L. Ed. 131, that limitation has never been applied to foreign imports. Hooven & Allison Co. v. Evatt, 324 U. S. 652, 65 S. Ct. 870; for several cases directly holding that the Twenty-first Amendment did not change this rule see During v. Valente, 267 App. Div. 383, 46 N. Y. S. 2d 385; Jameson & Co. v. Morgenthau, 307 U. S. 171, 59 S. Ct. 804, 83 L. Ed. 1189.

"We conclude that foreign imported liquor physically present within the taxing district but still in its original package, unconsigned and unsold on the assessment date, and still in the hands of the original importer, is still in foreign commerce, and that no state or any of the subdivisions has power to impose a personal property *ad valorem* tax on it."

See also National Distillers Products Corp. v. San Francisco (1956), 297 Pac. 2d 61; Cert. denied 352 U. S. 928, 1 L. Ed. 2d 163 (Dec. 3, 1956). This case involved ad valorem property tax assessments on both imported liquors and domestically produced liquors destined for export. The contention as to the taxability of the imports was abandoned on appeal as a result of the decision in the Parrot case (*supra*). The California Supreme Court also held that the liquors destined for export were also immune from state taxation under the Import-Export clause. San Francisco petitioned the U. S. Supreme Court for a writ of Certiorari which was denied. See further a recent

decision (January 9, 1962) by the Supreme Court of Wisconsin, which decided the question at issue in favor of the taxpayer (State Board of Review v. City of Milwaukee, *et al.*, 15 Wis. 2d 330, 112 N. W. 2d 914).

The correctness of the decisions in the Parrott and Wisconsin cases (*supra*) is further supported by the following statement of the law from American Jurisprudence:

> "While as a general rule the regulation of interstate and foreign commerce is a matter exclusively of federal regulation, the federal government has, by the Twenty-First Amendment, yielded some of its powers with reference to intoxicating liquors. The Twenty-First Amendment circumscribes the power of Congress by prohibiting the transportation or importation of intoxicating liquors into any state or territory for delivery or use in violation of the local law, but it does not deprive Congress of authority to control the importation of liquors into the United States. Moreover, Congress possesses the power to levy import duties on intoxicating liquors imported in foreign trade or commerce, and the several states, without the consent of Congress, are forbidden to lay duties on imports other than such as may be necessary for executing their inspection laws." 30 Am. Jur. 554-555.

ARGUMENT (Continued)

PART IV.

Is the Tax Imposed by K.R.S. 243.680(2) an Inspection Fee as Distinguished From a Revenue Measure?

The Import-Export Clause forbids a state from levying any tax on imports "except what may be absolutely necessary for executing its inspection laws".

To qualify as a levy necessary for the execution of inspection laws, it is encumbent that the state law imposing the fee provide for an actual inspection of the imported article. K.R.S. 243.680(2) makes no such provision nor does Regulation PN-13 (R., p. 20).

> "To come within the exception to the Federal Constitutional provision which forbids states to levy any imposts or duties on imports or exports, except such as are necessary for the execution of inspection laws, an inspection law must provide for actual inspection." 29 Am. Jur. 369, 370.

It is also imperative that the so-called inspection fee bear some close connection to the costs of the inspection service. Otherwise the levy will be regarded as a revenue measure and not an inspection fee. 29 Am. Jur. 368.

Classification of a state levy or impost as an "inspection fee" under Article I, Sec. 10, cl. 2, is narrowly circumscribed.

> "Generally, such laws are confined to such particulars as, in the estimation of the legislature and in accordance with the customs of trade, are

necessary to fit an article for market, by giving the purchaser public assurance that the article is in the condition and of the quality which makes it merchantable and fit for use or consumption. They are not founded on the idea that the things with respect to which inspection is required are dangerous or obnoxious in themselves. It has never been regarded as within the legitimate scope of inspection to forbid trade with respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse." 29 Am. Jur. 368, 369.

The revenues raised by the Kentucky tax on foreign imports of distilled spirits meet none of the foregoing criteria of an "inspection fee".

The inspection of imported distilled spirits as to their identity, proof, quality, standards of fill, and labeling is all performed by the Alcohol and Tobacco Tax Division, Internal Revenue Service, under authority of the Federal Alcohol Administration Act (27 U. S. C. 201-211).

Imported whiskey conforming to the labeling laws of the United States is deemed properly labeled under Kentucky Law (K.R.S. 244.230).

Since Kentucky makes no independent inspection of imported distilled spirits, any contention that the Kentucky import tax is an inspection law is, therefore, without merit. K.R.S. 243.680(2) is purely a revenue measure and has always been so regarded.

ARGUMENT (Continued)

PART V.

Petitioner's Brief.

Counsel for Petitioner rely heavily on the cases of Carter v. Virginia, 321 U. S. 131, 88 L. Ed. 605 (1944), and Gordon v. Texas, 310 S. W. 2d 328, aff'd 355 U. S. 369, 2 L. Ed. 2d 352 (1958).

These cases were also their main reliance before the Kentucky Court of Appeals. In rejecting the applicability of the Carter case, Chief Justice Stewart had this to say:

> "The case of Carter v. Virginia, 321 U. S. 131, 88 L. Ed. 605, relied on by appellee to sustain its right to levy the tax under consideration simply does not, in our view, uphold any such right or imply in any wise that the import-export clause of the Constitution of the United States may be ignored where the taxation of direct imports of foreign origin is involved" (R., p. 39).

In Epstein v. Idlewild Bon Voyage Liquor Corp., 212 Fed. Supp. 376 (1962), a three judge court for the Southern District of New York dealt at length with the decisions in the Carter and Gordon cases, *supra*, and also found that they were inapplicable to the facts in the Idlewild case which involved the taxation of exports of intoxicating liquor, whereas the case at bar involves imports. In view of the fact that the Idlewild case (October Term 1963, No. 116) is scheduled to be argued immediately preceding the arguments in the

case at bar, the Carter and Gordon cases will doubtless be discussed in the Idlewild case hearing; and so it seems needless to lengthen this brief by any further discussion of them here.

SUMMARY AND CONCLUSION.

1. K.R.S. 243.680(2) imposes a tax on all distilled spirits imported into Kentucky without regard to whether such spirits are imported from other states of the Union or from foreign countries.

2. Imports from foreign countries are immune from taxation by a state under the Import-Export Clause of the U. S. Constitution so long as they remain in the hands of the original importer, in unbroken packages, prior to sale and before being put to the use for which they were imported.

3. In 1871 this Court decided that imports of alcoholic liquors of foreign origin must be treated on the same basis as other imported articles under the Import-Export Clause.

4. Although the passage of the Twenty-First Amendment (1933) to the U. S. Constitution has had the effect of giving to the states a greater degree of control over intoxicating liquors moving in interstate commerce, the provisions of this Amendment have not repealed pro tanto the Import-Export Clause as applied to the taxation by a state of liquors imported from foreign countries.

5. K.R.S. 243.680(2) is a revenue measure and not an "inspection law" within the meaning of the Import-Export Clause, which forbids a state to lay ANY tax

on imports from foreign counties "except what may be absolutely necessary for executing its inspection laws".

6. The highest courts of three states (California, Wisconsin and Kentucky) have all rendered unanimous opinions invalidating state or local levies of taxes on imported liquors. The Wisconsin Court based its decision on the California Supreme Court case (*supra*) and the Kentucky Court of Appeals followed the California and Wisconsin cases, and adopted, as noted *supra*, the reasoning of the California opinion.

7. K.R.S. 243.680(2) is unconstitutional as applied to distilled spirits imported from a foreign country, in the hands of the original importer, in unbroken packages, prior to sale and before being put to the use for which they were imported.

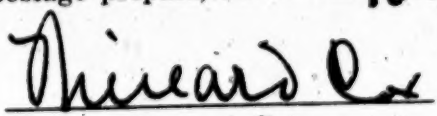
8. For the reasons above stated, Respondent urges that the decision of the Kentucky Court of Appeals be affirmed.

Respectfully submitted,

MILLARD COX,
1021-1023 Ky. Home Life Bldg.,
Louisville 2, Kentucky,
Counsel for Respondent.

January 10, 1964.

This is to certify that I have in accordance with the provisions of Rule 33, served opposing counsel with copies of this brief by addressing same to counsel at their respective post office addresses and depositing same in a United States mailbox with first class postage prepaid, all on this 10th day of January, 1964.



MILLARD COX,

Counsel for Respondent.